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**Women's Equality in the Canadian Criminal Justice System:
Something Less Than A Fair Shake**

by

P. Michael Cantlon

**Submitted in partial fulfilment of the requirements for
the degree of Master of Laws**

at

**Dalhousie University
Halifax, Nova Scotia
August 1999**

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DEDICATIONS

This work is dedicated to my wife Margo and to our son D'Arcy, who has enriched our lives more than what either of us thought was humanly possible.

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ABSTRACT

This thesis examines the issue of gender equality in the Canadian criminal justice system. It dissects two specific issues, the disclosure of a sexual assault complainant's therapeutic or counselling records and the prosecution of domestic assault charges. Within these two issues it is argued that the criminal justice system has failed to treat female victims of violent crime fairly and equally. Moreover, it is suggested that this failure is anchored in a neglect of the appreciation of the unique gender issues connected to these matters within a contextual framework.

With regards to the disclosure issue, a fundamental tenet, the presumption of innocence, and the accused's right to full answer and defence conflict with the complainant's rights to privacy and equality before the law. It is noted that where these rights conflict the courts have "balanced" the male accused's rights above those of the female complainant. The legislation enacted to address this issue and the courts' response to its constitutionality is examined to reveal the rationales relied upon by the courts to support their positions. As well, the evolution of female rights is presented through the treatment of similar issues within the jurisdiction of Canadian civil law.

Related to the matter of the prosecution of domestic assault charges, two recent initiatives in Ontario are presented. The conventional criminal justice system's response to the realities connected with these type of offences has failed to appreciate the context in which these transgressions take place. The numerous potential causes and consequences of domestic violence are reviewed to depict the complexities associated with the issue and to stress that there is no simple solution to the potentially fatal crimes.

Lastly, any meaningful reform must begin with a contextual appreciation of the gender components of the issues. Regarding the disclosure of a sexual assault complainant's counselling records it is urged that the courts must recognize the harm that flows from the breach of privacy of these highly sensitive materials. Judicial notice, based on the principle of distinction between legislative facts and adjudicative facts, is suggested as a key to fair and equal interpretation of the legislation enacted to guide the courts on these applications. As for the reforms set out for equality improvements for the prosecution of domestic assault charges, it suggested that the answer to meaningful rectification to improved access to justice for the victims of domestic violence is a better appreciation of the causes and consequences of the behaviour, including the nature of the cycle of violence.

ACKNOWLEDGEMENTS

I would like to take this opportunity to thank a number of individuals who helped make this project a reality. First of all to Bruce Archibald and Richard Devlin, my faculty supervisor and second reader respectively, for their scholarly input and editorial advice. They both were quite patient with a young middle-aged dog trying to learn a few new tricks. Next, I should mention my employer, the Ministry of the Attorney General of Ontario and more specifically my immediate supervisor Paul Taylor. It was as a result of his kind words of recommendation regarding my leave of absence that allowed me to take a hiatus from the Peel Crown's office to travel east to pursue an academic goal a decade old.

I would also be remised if I failed to mention my loving wife Margo. She has taught me more about gender equality issues than any other person on the planet, yet I do not recall ever speaking with her, at any length, about the subject. She is a dedicated mother to our two-year-old son D'Arcy, a wonderfully bright individual and an exceedingly diligent business leader of national repute. She is a highly motivated self actualized citizen truly making a significant difference by leading through example. It is the way that she lives her life that motivated me to study and write about the issues examined in this thesis.

Lastly, and perhaps more of a request than an acknowledgement, I ask that anyone reading this work to consider the Canadian women harmed and/or killed by intimate male

violence. It need not affect you directly, as it did our family through the tragic death of Ms. Susan McArthur (who was shot and killed by her husband in Hamilton, Ontario shortly after she attempted to separate from him) to appreciate the terrible suffering and waste of human life connected with this type of behaviour. We should all feel as if we can make a difference by recognizing the inequalities that exist within the criminal justice system and then discussing them openly. Much work is needed in the field so that meaningful reforms can be commenced and carried out.

PREFACE

(A) Perspective and Outline

The goal of my thesis work is to apply my practical experiences and insights that I experienced as an Assistant Crown Attorney in a large urban centre in Brampton, Ontario to the recent scholarly revelations that I have made since my return to the campus. In this project I have included a significant level of perspective distilled from some of the frustrations that I regularly worked through as an officer of the court and a quasi minister of justice in the judicial district of Peel. Looking back on my practical experiences as a criminal prosecutor, I recall the two areas of my work that I found to be the most frustrating were the prosecution of sexual assault cases and the general level of dissatisfaction I had with the way that the criminal justice system dealt with the victims of domestic violence. And to be specific, many of the frustrations I felt were grounded in female witnesses' unwillingness to participate in the fact finding missions of a trial.

(B) Nature of the Problem

With regard to the issue of sexual violence, I had the unique opportunity to be delegated as our office's sexual assault co-ordinator. In addition to meeting with countless victims of such offences to prepare them for trial, I was also able to regularly meet with other prosecuting crowns, victim support persons, investigating officers and other involved professionals. I was also routinely required to enter the adversarial arena to prove beyond a reasonable doubt that these terribly destructive and criminal acts transpired in the ways that these vulnerable complainants described. All too often, I became frustrated by the

inadequate rules of evidence and criminal processes that seemed to prevent the community from obtaining its fair access to justice. By fair access to justice I mean systemic factors that seemed to dissuade female witnesses from willingly wishing to have their complaints tested and prosecuted in the criminal courts. I also had the distinct pleasure of working with the members of the Peel Rape Crisis Centre to develop a Rape Crisis Protocol. The purpose of this Protocol was to allow all of those individuals coming into contact with sexual assault complainants a better appreciation of the implications associated with the overall system and some of the very unique rights and needs of these predominately female complainants. As well, the Protocol highlighted the impact that those individuals interacting with the complainants could have on the eventual criminal court process. I found these involvements to be professionally rewarding. They now act as a starting point for what I hope will be further advancements in the criminal justice response to the sexual assault complainant's needs.

On the domestic assault front, again in addition to being directly involved in the routine job requirement of the prosecution of these cases, I was assigned the duty of being a domestic assault co-ordinator. Such a position required many of the same public liaison functions and resource contacts as outlined above for the sexual assault co-ordinator. This assignment was enough to give any right thinking person a terrible sense of dissatisfaction, particularly because not enough was being done to protect the women and children trapped in these dangerously violent and abusive relationships. Yet my experiences took me even further in recognizing a problem. I was also regularly assigned

as our provincial court's "duty crown." One of the responsibilities of the "duty crown" was to meet with women wishing to have "their" charges dropped. Every weekday afternoon from 2:00 until 4:30, in 30 minute intervals, I was required to meet with domestic assault complainants, all of whom had one unifying request: that the charges against their husbands or boyfriends be dropped. Regardless of the distinctions in culture, religion, socioeconomic status, the number of children hiding behind their mother's legs or, from time- to-time, the type of make-up used to mask the physical signs of abuse, they all came with a common hope that I could save their marriage and their lives by ignoring the situation that they found themselves in. It was the most remarkable and disturbing social phenomenon that I have ever witnessed.

CHAPTER ONE: INTRODUCTION

(A) Introduction

Currently, a debate is being waged about the need and the form of reforms required to improve the Canadian criminal justice system. Much of this debate is focused on the rights of female victims of crime and their access to a fair, impartial, effective and an equal social system of justice. Some believe that there is very little if anything that can be salvaged from a system based on historical and antiquated traditions that no longer have a place in our modern society.¹ Others would suggest that although reforms are warranted, a wholesale change in the way we protect the public from the harm caused by criminal acts and the way that we deter those individuals inclined to cause such harm would fail to accomplish those goals.² This project aligns itself with the latter camp. Much improvement is required to maintain a just, fair, efficient and impartial criminal justice system. The purpose of this thesis is to establish how the Canadian criminal justice system has failed to treat female victims of crime fairly and equally. The core premise of this work is that the criminal justice system has failed these women because it has failed

¹L. Berzins, "'Restorative' Justice on the Eve of a New Century: the need for social context and a new imagination" (April 1997) [unpublished, text delivered at the Canadian Institute for the Administration Justice, Montreal].

²B. Archibald, "A Comprehensive Canadian Approach to Restorative Justice: The Prospects for Fair Alternative Measures in Response to Crime" in D. Stuart, R. Delisle, and A. Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Scarborough, Ont.: Carswell, 1999).

to appreciate (within a contextual framework) the gender issues linked to two unique matters that bring women before the courts. In Chapter One this thesis is developed by examining some of the basic principles and goals of our criminal justice system. To present a perspective, the work also provides discussion on the nature of the adjudication process, its parties and their respective roles. The two central issues presented here that test our criminal justice system's ability to treat female victims of crime equally, fairly and impartially are (1) the disclosure of a sexual assault complainant's therapeutic or counselling records, and (2) some recent responses to the prosecution of domestic assault charges. With regard to the disclosure issue, we observe the fundamental tenet of the presumption of innocence and the accused's right to full answer and defence come into direct conflict with the rights of sexual assault complainants to privacy and equality before the law. These matters are dissected in chapter two. The issues connected to the prosecution of domestic assault charges, particularly the shortcomings of the conventional criminal justice system's responses to the broader contextual realities, such as the cycle of violence, are reviewed in chapter three. Solutions to these problems are canvassed in chapter four, where it is argued that any meaningful reforms will require a deeper contextual appreciation of the issues. This premise holds true regardless of the direction in which these improvements move - either the modification of the existing conventional approaches within the realm of due process, or the community based restorative justice paradigm.

To effectively accomplish these tasks a definitions and terminology section has been

included in this introductory chapter. As well, a discussion regarding the prevalence and scope of these two issues is set out. This is done for two reasons. First, to establish the societal significance of sexual and domestic assaults, and second to identify some of the complexities connected with the issues so as to further the argument that any improvements proffered by the reformers must include a contextual understanding of the issues. It is the goal of this project to suggest that a contextual understanding of the issues will promote a greater level of equality and justice for female victims of crime. The framework for the development of the importance of contextualism and the parameters for reform, are set out in the theory section of this chapter.

(B) Definitions and Terminology

Complainant, witness, victim or sexual assault survivor? The task here is to examine certain definitions and explain the choices for some of the terminology used throughout this thesis. This is an important component of the work for two reasons. The first reason is that the terms used to describe the witnesses to be scrutinized in this project will carry with them certain connotations on at least two distinct levels. On one level, the choices that are made will eventually create a tone and an inferred perspective on the subject matter that is discussed. In short, the terms used to describe the female witnesses will have an impact on their treatment and, therefore, their social realities. As well, the terms used will condition the readers' contextual perceptions of the issues outlined in this work. On a different level, the terms used will also suggest inferences about the author. The

second reason that language is a significant component of this work is that it will be argued that certain inferences should be drawn from the language used by the courts as revealing a reluctance within some rulings to treat female witnesses equally. This highlights a broader contextual reality of women's inequality, than that merely identified in the criminal justice system. This position is premised on the notion that the words used are deeply connected to rationales used by the judges interpreting legal principles. As a result, the selection of terminology should not be under-taken without some reflection.

Many legal scholars have recognized the importance that language used in legal studies has for both the subject matter being discussed as well for the author theorizing on the subject matter. For example, G. Matoesian, studying the interaction among law, language and power identified this perspective and wrote:

In very tacit and taken-for granted fashion, language categorizes and legitimates our interpretations about social reality, sustaining some versions while disqualifying others and conceals the hierarchical arrangements and sexual differences between men and women. Language is a system of power for those who control it, and, in the context of the rape trial, talking power transforms the subjective violation of the victim - the victim's experience of sexual terror - into an objectivity: namely, consensual sex.³

Also J. Thompson applied a similar importance and complexity to language, as he contemplated:

The analysis of ideology is fundamentally concerned with language, for language is the principle medium of meaning (signification) which serves to sustain relations of domination. Speaking a language is a way of acting,

³ G. Matoesian, *Reproducing Rape, Domination through Talk in the Courtroom* (Chicago: The University of Chicago Press, 1993) at 2.

emphasized Austin and others; what they forget to add is that ways of acting are infused with forms of power. The utterance of the simplest expression is an intervention in the world, more or less effective, more or less endowed with institutional authority. 'Language is not only an instrument of communication or even knowledge' writes Bourdieu, 'but an instrument of power. One seeks not only to be understood but also to be believed, obeyed, respected, distinguished.'⁴

An analogy that helps to interpret these passages is the art of painting. Language is much like the paint selected to depict the image or convey the imagery of the painter's desire, more so than the brush that is used to apply the medium. It is the paint, particularly its colour and texture, that creates the thoughts and memories connected to the work for the person observing and absorbing the painting. The brush merely helps the artist complete the process. Similarly, the language used by an author creates imagery and context for their subject matter.

Applying these principles to this study, one must consider the potential impact that the terms selected to describe those females who have complained to the authorities about being sexually assaulted and find themselves before the criminal courts as witnesses will have on their contextual situations and realities. For example, some of the literature

⁴*Ibid.* at 220. See also J. Thompson, *Studies in the Theory of Ideology* (Cambridge: Polity Press, 1984) at 131. Further reference to L.J. Austin's position is explained at page 6. It is emphasized that speech is a way of acting and not simply reporting or describing. As such an adequate account of language must take into consideration the author's experiences to appreciate his or her "speech-acts." The reference to Bourdieu was noted to P. Bourdieu, "L'economie des échanges linguistiques," *Langue Française* (mai 1977) at 20. For a review of Bourdieu's contribution to the sociology of culture see N. Garnham and R. Williams, "Pierre Bourdieu and the sociology of culture: an introduction," (1980), 2 *Media Culture and Society* at 209-223.

reviewed to date suggests that the term “sexual assault survivor”⁵ is appropriate, as a positive term recognizing the strength required to live with an experience of sexual assault. It is a term which suggests that although the individual victim had no control over the assault, they are empowered to have options in their responses and are actively involved in the process of reclaiming their personal lives. This term would seem at first glance to be preferred to “sexual assault victim” that infers much less empowerment. However, the difficulty that arises with both terms is that they presuppose that the transgression complained of occurred in fact, prior to there being a court disposition. This approach violates our criminal justice system’s fundamental tenet: the presumption of innocence.

A related problem of language applies to the terms of “domestic assault,” “family violence” and “wife assault.” Each of these terms bring with them certain connotations and levels of societal acceptance. Similarly, when attempting to choose a term to describe instances of physical violence perpetrated by a male person on a female partner’s person, one might argue that the term wife assault is inappropriate because the term “wife” connotes an antiquated notion of relationships grounded in a tradition of proprietary interests and inequality. Others might suggest the terms “domestic assault” and “family violence ” are inappropriate because they do not accurately describe the nature of the

⁵ M. Whalen, *Counseling to End Violence Against Women: A Subversive Model* (Thousand Oaks: Sage Publications, 1996) at 51. See also the Region of Peel (Ontario) Sexual Assault Emergency Response Protocol (October 1996) [unpublished, available at the Rape Crisis Centre, Mississauga, Ontario] at page 10.

abuse that flows almost exclusively from the male party towards the female victim.

Having contemplated the potential impact that the terms selected might have on the female witnesses, the second issue to be addressed is the recognition that the terms selected also reflect back onto myself and my own life experiences. This notion was eloquently expressed by L. Bersianik when she wrote:

Language is not the product of spontaneous generation. We cannot separate what we are from how we speak, ourselves from language, tongue from speech. Language reflects the mentality of the individuals who speak it, and who are spoken by it.⁶

This same theme composed the central assumptions of C. Gilligan's research that examined human psychological developmental theories built exclusively on observations of men's lives by male scientists. In her work she recognized that "the way people talk about their lives is of significance, that the language that they use and the connotations that they make reveal the world that they see and in which they act."⁷ This notion is accepted as true and explains why, in some detail, my professional experiences that have impacted upon my scholarly orientations are set out in the preface to this work.

⁶L. Bersianik, "Women's Work" in A. Dybikowski, V. Freeman, D. Marlatt, B. Pulling & B. Warland, eds., *In the Feminine: Women and Words / Les Femmes et les Mots* (Edmonton: Longspoon Press, 1983) at 157.

⁷C. Gilligan, *In a Different Voice Psychological Theory and Women's Development* (London: Harvard University Press, 1982). In her work she theorizes that psychology's developmental theories have been established on the observations of men's lives. Here she attempts to correct psychology's misperceptions and refocus its view of female personality. This work attempts to reshape our understanding of human experience.

The third reason that these terms need to be addressed is that I am a male discussing and analysing issues that may affect all members in our society, but directly impact women. I am cognizant that some feminist theorists have examined the significance that language selection has on the effect of assisting in the control and oppression of women by men.⁸

This has been explained, in part, by Carol Gilligan by the fact that women have historically been left out of the debate and not been allowed to contribute to the evolution of the language that is used to explain the theories related to human development. She suggested reform that would allow for women's direct involvement in the debate. Her hope was that:

The interpretation of women's experience in terms of their own imagery of relationships thus clarifies that experience and also provides a nonhierarchical vision of human connection. Since relationships, when cast in the image of hierarchy, appear inherently unstable and morally problematic, their transposition into the image of web changes an order of inequality into a structure of interconnection.⁹

Having outlined these three components of the relationship between language and scholarship, the choices made as to the terms used and the rationale behind those selections will now be reviewed.

⁸ H. Eisentstein, *Contemporary Feminist Thought* (London: Unwin Paperbacks, 1984). In this work, on the issue of the symbolic language of pornography she suggested that one effect was the inference of the right of men to control women (at page 118). Also, she suggested another example of the gender division of labour in Western culture, "that artificially assigned language, culture and authority to men, and nature, sexuality, and feeling to women." (at pages 119 to 120). See also A. Dworkin *Pornography: Men Possessing Women* (New York: Perigee / G.P. Putnam's, 1981).

⁹C. Gilligan, *supra* note 7 at 62.

The Canadian courts have traditionally described female witnesses who come before the criminal justice system to testify about criminal acts of sexual violence or interference as “sexual assault complainants.”¹⁰ The cases that are reviewed in Chapter Two all use the term “sexual assault complainant.” Still, it is a term that has been established in the jurisprudence without great influence from the women who have come to the criminal justice system seeking nothing more than fairness and justice. As such, some female authors suggests that sexual assault survivor is a more contextually accurate descriptor. However, as indicated earlier, this title presupposes the finding of fact. Thus, given that the applications for disclosure discussed in this thesis occur prior to determination of guilt, coupled with the fact that a fundamental tenet of our criminal justice system is the presumption of innocence, the term “sexual assault complainant” has been retained. It is presented as a “credibility neutral” term that has been selected to describe the female parties who come before the courts as Crown prosecution witnesses. This is done with the recognition that a legitimate criticism of this choice is that it falls into the same traditional obstacle of disallowing the women directly impacted by sexual violence a voice in the debate. Still, it is hoped that as these issues develop over time, the women who survive violent sexual violations are given the opportunity to have direct and meaningful input in the determination of a term that they find most acceptable.

¹⁰ The first reported case in the Canadian Criminal Cases journal that deals with sexual assault or “rape” charges is *R. v. Graham* (1899), 3 C.C.C. 22 (Ont. H.C.). In this case that Court used the term “complainant.” A review of cases after 1899, selected at random, up to the pre-Charter year of 1981, found that all used the term complainant to describe the female witnesses that testified about sexually assaultive criminal acts. For example, see *R. v. Landry* (1935), 64 C.C.C. 104 (N.B.S.C.); *R. v. Blondheim* (1980), 54 C.C.C (2d) 36.

With regards to the instances involving male partners physically assaulting¹¹ their female partners, the term “domestic assault” has been used, primarily because it is the term used most frequently in the literature to describe the specialized courts established to deal with some of the criminal charges that are examined here. It is, as M. Whalen observes, probably the most popular and widely used phrase to refer to the phenomena, even though it obscures the social and gender dimensions of the behaviour.¹² This choice has been made, in part, to avoid confusion and in full recognition of the statistics found and reported by the Canadian Panel on Violence against Women, specifically that based on 420 in depth interviews conducted with women between the ages of 18 and 64, all of the physical violence reported by the women were perpetrated by their “male intimates.”¹³ This choice has also been made in full appreciation of the fact that it is term that is far

¹¹ Although other forms of abuse are recognized by the author as significant, they are outside the purview of this work. The discussions within this work are limited to acts of physical violence between domestic partners. The term “assault” is defined by section 265 of the *Criminal Code*, R.S.C. 1985 c. C-46 as “A person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; (b) he attempts or threatens, by act or gesture, to apply force to another person, if he has , or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.”

¹²M. Whalen, *supra* note 5 at 18.

¹³The Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence Achieving Equality* (Ottawa: Minister of Supply and Services Canada, 1993) [hereinafter, The Panel].

from being universally accepted as appropriate or ideal.¹⁴

Also, the terms “stereotype” or “stereotypical” and “myths” are used in references and in some of the analysis sections of this thesis. No attempt has been made to interpret meaning into the terms used by others. However, if used within the realm of analysis, these terms should be interpreted by their ordinarily defined meanings. These include: “myth” as “an ill-founded belief held uncritically, especially by an interested group,” and “stereotype” as “something conforming to a fixed or general pattern, especially a standardized mental picture that is held in common by members of a group and that represents an oversimplified opinion, affective attitude, or uncritical judgement.”¹⁵ The essence intended in the use of these words is to suggest that factual inferences or conclusions have not been drawn from evidence tendered at a hearing but rather represent unreasonable conjecture and suspicion, rooted in uncritical judgement.¹⁶ The distinction between these concepts and those connected to the determination of facts through the principle of judicial notice are important. This is discussed in chapter four, where it is

¹⁴Other alternatives have been selected by scholars writing in the area. For example, M. Steinman prefers “woman battering” as defined as “violence by men against women intimates regardless of their marital status of living arrangements.” M. Stienman, *Women Battering: Policy Responses* (Cincinnati: Anderson Publishing Co. and Academy of Criminal Justice Sciences, 1991). Compare this term with “wife assault” as discussed in Hilton N., *Legal Responses to Wife Assault Current Trends and Evolutions* (Newbury Park, California: Sage Publications Inc., 1993). See also M. Whalen, *supra* note 5 at 18.

¹⁵*Webster's New Collegiate Dictionary*, 8th ed., (Toronto: Thomas Allen and Son Limited, 1980) s.v. “myth” and “stereotype.”

¹⁶See *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 209 for a review of legal inferences.

argued that the principles underlying the doctrine of judicial notice are grounded in broadly accepted truths as compared to uncritical judgements.

(C) Thesis Development

As noted earlier, the goal of this project is to assess the effectiveness of the criminal justice system's fair and equal treatment of female witnesses in two very specific instances: first, the disclosure of a sexual assault complainant's therapeutic or counselling records; and second, the prosecution of domestic assault charges. The purpose of this thesis is to determine whether the criminal justice system is treating female witnesses, community and male accused fairly and equally, given the unique features of these two specific issues. The perspective of this work is that more needs to be done to balance the competing interests of the parties and witnesses to ensure fairness, equality and access to justice for all interested parties. Specifically, it is suggested here that a contextual appreciation of the issues is the key to meaningful reform. The meaning of "context" and the role it plays in interpreting legal policy is discussed below in the theory section of this chapter. Nonetheless, some basic explanation is warranted at this point.

R. Devlin describes contextualism in law as "the process of locating phenomena in their relational affinity to other influential forces."¹⁷ For the purpose of this work contextualism

¹⁷R. Devlin, "The Charter and Anglophone Legal Theory" (1997) 4 Review of Constitutional Studies 19 at 23. This article demonstrates that "Charter-driven jurisprudence has had a significant impact, both quantitatively and qualitatively, on

attempts to identify the interrelationships between social variables and how one component connects to another within the realm of the law. J. Stubbs recognized this position as she contemplated some of the modern legal responses to the issue of violence against women. She wrote:

Women's lives are complex, multi-dimensional and inter-connected with others. Any singular measure of the outcome and the resort to the law to deal with violence risks misrepresenting this complexity, and misunderstanding the context in which the law is involved.¹⁸

This thesis contrasts the competing interests of a male accused person with female victims of violent crime and then locates these issues within their relational link to other influences within our society. Likewise, with regards to the phenomena of domestic assault, both the conventional responses and the two recent criminal justice initiatives created to improve the problem are examined from their position within the criminal justice system as well as a number of other relational forces. For example, the possible causes and consequences of this form of physical violence are discussed so that the effectiveness of the new initiatives can be appreciated within the broader connected societal influences. The desired outcome of this approach is meaningful and effective reforms.

Anglophone Canadian legal scholarship.” (at 78). See also S. Sugunasiri, “Contextualism: The Supreme Court’s New Standard of Judicial Analysis and Accountability” (August 1998) [unpublished, available at Dalhousie University, Halifax Nova Scotia].

¹⁸J. Stubbs, “‘Communitarian’ Conferencing and Violence Against Women: A Cautionary Note” in M. Valverde *et al*, eds., *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995) at 265.

To begin to fully appreciate the parties' interests in a broader context, one first needs to examine the adversarial process and the general nature of the adjudication procedure of the criminal justice system. To start, the basic function of a contested law suit should be considered. Hart and McNaughton describe such a social formal dispute resolution mechanism as "society's last line of defense in the indispensable effort to secure the peaceful settlement of social conflicts."¹⁹ Clearly, it is generally accepted that a certain and organized manner of dispute settlement is required to allow for a functioning society. This is so not only for the specific parties involved in the conflict but also for all members of a community so that they can work, live and function in an organized, predictable and safe manner on a daily basis. A critical component of this dispute settlement system is public confidence, without which people would attempt to resolve conflicts themselves, which would lead to unpredictability, injustices and perhaps social chaos. Two significant ingredients in public confidence are impartiality and fairness in the process of resolution. Regarding these ingredients Hart and McNaughton concluded:

In judging the law's handling of its task of fact-finding in this setting, it is necessary always to bear in mind that this *is* a last-ditch process in which something more is at stake than the truth only of the specific matter in contest. There is at stake also that confidence of the public generally in the impartiality and fairness of public settlement of disputes which is essential if the ditch is to be held and the settlements accepted peaceably [emphasis theirs].²⁰

¹⁹ Hart and McNaughton, *Evidence and Inference in the Law*, D. Lerner ed., S. Schiff, *Evidence in the Litigation Process*, 3rd ed., (Toronto: The Carswell Company Limited, 1988) vol. 1 at 9.

²⁰ *Ibid.* at 9.

Obviously, this social system is not perfect. Nor does the public confidence demand it to be. Still, it is important that court is correct in its finding of facts. It is also important that the court makes its determinations of issues based on the evidence presented by the parties and through the application of legal principles. However, complete certainty in this process is both “impracticable and undesirable.”²¹

The unique feature of the conflicts that arise between individuals within the sphere of criminal conduct is the role of the state. First principles describe a system that codifies certain harmful conduct. If a member of our community conducts him or herself in a way that contravenes the Criminal Code²² then the state first becomes involved in the investigative stage of the fact finding inquiry. The police, having received certain information from either a complainant or a third party, attempt to gather evidence in an effort to determine if the conduct brought to their attention, or observed directly, breached the codified law. If the police make a determination that they have reasonable grounds to believe a criminal act has occurred, they may lay an information on behalf of the state indicating that breach. Once this is done, any individual(s) specifically harmed by the conduct in question, now forfeit(s) control over the transgression to the “litigant party,” namely the state. However, the complainant still retains the right to pursue legal remedies as a direct litigant in the civil justice system. These avenues are beyond the scope of this thesis. Within the criminal justice system the state’s interests are, in theory, those of the

²¹*Ibid.* at 9.

²²Criminal Code, R.S., c. C-46.

community. The harmed individual or victim is considered a member of that community, but not a direct litigant. The harmed individual's interests are represented by the Crown Attorney and protected by the court. The discretion to proceed or not, and in what fashion, is left to the Crown Attorney, acting as an agent for the provincial Attorney General, whose authority in principle can be traced to the British Sovereign, her Majesty the Queen.²³ In theory, the accused person is now prosecuted on behalf of the state, because the conduct alleged to have taken place, at least potentially, effects the entire community. The individuals specifically harmed now become Crown witnesses and, as indicated above, are no longer direct parties to the proceeding.

The other litigant in this criminal process is the person charged with the criminal offence. The fundamental tenet of our criminal justice system is that they are presumed innocent until the Crown has met its onus of proving each essential element of the offence(s) charged beyond a reasonable doubt. He or she is also entitled to due process and a number of procedural safeguards that reduce the possibility of a wrongful conviction.

The conventional method of establishing this proof within these safeguards is called the criminal process and has been described by H. Packer as a:

compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear (or keep it from coming to bear) on persons who are suspected of having committed crimes. It can be described, but

²³For a further review of Crown discretion see B. Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tension between Punitive and Restorative Justice" (1998) 3 Can. Crim. L.R. 69.

only partially and inadequately, by referring to the rules of law that govern the apprehension, screening and trial of persons suspected of crime.²⁴

To examine the efficiency and effectiveness of the criminal process H. Packer created two models; the “Due Process Model” and the “Crime Control Model.” He explained the purpose of the two models:

The two models merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions of the tension between competing claims.²⁵

The Canadian criminal justice system is premised on the philosophy of the due process model. To appreciate the purpose of our system both models need to be explored.

At the core of the crime control model is the primary function to be performed by the criminal process, specifically the repression of criminal behaviour. The failure of a criminal justice system that is unable to enforce criminal laws and decrease, if not prevent, criminal conduct is that society will develop a general disregard for the restrictions on their conduct as established in laws. As a result, the crime control model has as its primary focus the efficiency with which the criminal process works to investigate, determine guilt and properly sentence persons that have been convicted of criminal conduct. H. Packer suggests that an extension of this is a *de facto* “presumption

²⁴H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 149. This work explores the shortcomings and imperfections of the criminal process as a means of social control. As well, the relationship between the criminal process and the substance of the criminal law is explored.

²⁵*Ibid.* at 153.

of guilt” that operates against accused persons who are not screened out of the investigative stage of the process.²⁶

On the other hand, the due process model rejects the philosophy that investigators and prosecutors are well suited to accurately establish the facts of the alleged criminal conduct. Rather, an adjudicative fact-finding process is preferred that incorporates the possibility of error. Therefore, equally important goals of this process are the protection of the “factually innocent” and the conviction of only the “factually guilty.”²⁷ These goals are balanced by factual determinations within a procedure that safeguards the integrity of the process, including the right to legal counsel and the exclusion of reliable but illegally obtained evidence.²⁸ At its core is the presumption of innocence.

Another important distinction between the two models are their respective validating power sources. H. Packer summarized the differences:

Because the Crime Control Model is basically an affirmative model, emphasizing at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial

²⁶*Ibid.* at 158.

²⁷*Ibid.* at 165.

²⁸See the Charter of Rights and Freedoms, sections 10(b) and 24(2). See also *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.); affirming (1983) 2 C.C.C. (3d) 339 (Ont. C.A.) regarding the limitations on the rights and freedoms guaranteed under the Charter. The significance of due process and other procedural safeguards is also examined.

and requires an appeal to supra-legislative law, to the law of the Constitution.²⁹

Therefore, when we examine the Canadian criminal justice system we find the person entrusted to assess the many trial issues, including the protections of due process, the determination of facts, guilt or innocence, in a fair equal and impartial manner is a judge. In some cases these responsibilities are separated, with the fact finding responsibilities being delegated to a jury.³⁰ The jury is created from members of the community in which the offences are alleged to have transpired in.³¹ Except for the application of certain legal doctrines, such as judicial notice, all of these determinations are made on the formal presentation of evidence by the parties to the litigation to the judge, who is not an expert to the specific issues in dispute. Hart and McNaughton point out imperfections in such a system, particularly that:

No doubt the method of formal presentation of evidence before an impartial but uninformed tribunal, subject to the rules which such a presentation seems to require, will not always prove to be the best method of ascertaining the truth about past happenings. The law makes no assumption that it will. It deliberately sacrifices some aids to the ascertainment of the truth which might be useful in particular cases in order, partly, to serve what are deemed to be more nearly ultimate social values. It is an important question whether these sacrifices are justified - whether, granting the possibilities of improvement in peripheral matters of detail, the main outlines in the law's approach to the task of determining

²⁹H. Packer, *supra* note 24 at 173.

³⁰*Criminal Code*, R.S.C. 1985, c. C-46, Part XIV s.471.

³¹*Ibid.* s. 626. Each provincial jurisdiction outlines the qualifications of potential jurors, see for example *Juries Act*, R.S.O. 1990, c. J.3.

questions of this kind are not entitled to general acceptance.³²

Relating this somewhat simplified overview of the basic goals and interests back to our specific issues, this thesis will review and analyze in chapter two how the courts and legislative branch of government have attempted to reconcile the opposing interests of the accused person right to full answer and defence and the rights of the complainant to privacy and equality before the law, related to the specific issue of the disclosure of the complainant's therapeutic or counselling records. In chapter three, this project will examine the conventional approach to the prosecution of domestic assault charges and in doing so point out the many unsatisfactory frailties connected to this process. The conventional criminal justice response to these type of offences is then compared to the goals and processes of the restorative justice paradigm. The distinctions between the two processes are examined to ascertain if a community based restorative system is better equipped to resolve these conflicted domestic relationships. Following this, improvements are postulated that stress the need to contextualize these issues to advance increasingly fair and equal treatment and access to justice for both the community and the victims of both sexual and domestic assaults.

(D) Scope of the Problem

1. The Numbers

To commence this section it must be noted that it is more than a mere co-incidence the

³²Hart and McNaughton, *supra* note 19 at 10.

failings within the criminal justice system related to the disclosure of a sexual assault complainant's records and to domestic assaults, are anchored around a gender component. Sexual violence, other than those incidents involving children, almost always involves a female complainant and a male accused. The Canadian Panel on Violence Against Women³³ reported the following statistics related to the sexual abuse of females under the age of 16:

- * More than one half (54 percent) of the women had experienced some form of unwanted or intrusive sexual experience before reaching the age of 16.
- * 24 percent of the cases of sexual abuse were at the level of forced sexual intercourse.
- * 17 percent of women reported at least one experience of incest before the age of 16.
- * 34 percent of women had been sexually abused by a non-relative before age 16.
- * 43 percent of women reported at least one experience of incest and/or extra familial sexual abuse before the age of 16.
- * 96 percent of perpetrators of child sexual abuse were men.³⁴

Regarding the sexual abuse of females over the age of 16, The Panel reported the following statistics:

- * 51 percent of women have been the victim of rape or attempted rape.
- * 40 percent of women reported at least one experience of attempted rape.
- * Using the Canadian Criminal Code definition of sexual assault (this includes sexual touching): two out of three women, have experienced what is legally recognized to be sexual assault.
- * 81 percent of sexual assault cases at the level of rape or attempted rape

³³ The Panel, *supra* note 13. In the absence of nationally maintained statistics on the scope of the violence suffered by females in our society, The Panel partially funded a community based study in Toronto, Ontario. In the study 420 women were selected at random. On a one-to-one basis, in-depth interviews were conducted by trained interviewers. The results of these interviews were tabulated as set out above.

³⁴ *Ibid.* at 9.

reported by women were perpetrated by men who were known to the women.³⁵

Similarly, incidents of domestic assaults brought to the attention of investigative agencies almost always involve allegations of a male partner physically abusing his female partner. The Panel found the following disturbing statistics related to the issue of incidents of physical assault in intimate relationships:

- * 27 percent of women have experienced a physical assault in an intimate relationship.
- * In 25 percent of the cases, women who were physically assaulted reported the their partners explicitly threatened to kill them.
- * In 36 percent of the cases, women reporting physical assault also reported that they feared they would be killed by their male intimate.
- * 50 percent of the women reporting physical assault also experienced sexual assault in the context of the same relationship
- * All of the physical assaults on women were perpetrated by male intimates.³⁶

These numbers provide us with some insight as to the scope of the victimization of women in our society. Still, it is but one study that has limited application to an assessment of the national picture. One national survey that did definitively address the

³⁵*Ibid.* at 9. Note “sexual assault” is not a defined term within the Criminal Code, although section 271 creates the offence and provides for punishments. “Sexual assault” is an assault as defined in section 265 of the Criminal Code committed in circumstances of a sexual nature. The test to be applied by a judge or jury to determine if the conduct in question is of a sexual nature is objective. The entire set of circumstances must be considered to make a determination of conduct amounting to a sexual assault. The intent or purpose and motive of the accused are factors that should be considered to determine whether or not the conduct in question is of a sexual nature. *R. v. Chase* (1987), 64 C.C.C. (3d) 97 (S.C.C.). See also *R. v. Moreau* (1986), 26 C.C.C. (3d) 359 (Ont. CA.); *R. v. Cook* (1985), 20 C.C.C. (3d) 18 (B.C.C.A). Section 151 of the Criminal Code does set out the conduct included in the offence of “sexual interference,” specifically as “every person, who for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years.”

³⁶*Ibid.* at 9.

most extreme form of violence was the *Homicide Survey*.³⁷ It revealed that in 1991, 270 women in Canada were murdered. Investigative agencies reported that of this number, 225 were classified as solved. From this categorized number, it was determined that 210 of the women were killed by men and 121 were killed by their intimate partners.

The other significant Canadian study that attempted to determine the prevalence of violence suffered by women on a national basis was Statistics Canada's Violence Against Women Survey conducted in 1993.³⁸ The purpose of this survey was to elicit information on the full range violence, both sexual and physical assault abuses, that women experience in all types of relationships. R. Gartner and R. Macmillan explained the process used in the survey:

Women reporting incidents of victimization were asked a series of detailed questions about the characteristics of the incident, the effects of the victimization on them, and the actions they took as a consequence of their victimization.³⁹

³⁷Canadian Centre for Justice Statistics, *The Homicide Survey, 1991* (Ottawa: Statistics Canada, 1993). These numbers can be compared to the 1988 rates wherein 65% of the homicides victims were men and 35% were women. A total number of 70 women were killed by their husbands. See "Homicide" in *Canadian Social Trends Vol. 2*, (Toronto: Thompson Educational Publishing Inc., 1994) at 419-420.

³⁸The survey took place between February and June 1993; see K. Rodgers, "Wife Assault in Canada" *Canadian Social Trends* (Ottawa: Statistics Canada, 1994) at 3, and K. Rodgers, "Wife Assault: The Findings of a National Survey," *Juristat*, March 1994, Vol. 14, No. 9 Cat. 85-002, as cited in the *Final Report, From Rhetoric to Reality Ending Domestic Violence in Nova Scotia*, Law Reform Commission of Nova Scotia, February 1995.

³⁹R. Gartner and R. Macmillan, "The Effect of Victim - Offender Relationship on Reporting Crimes of Violence Against Women," (1995) 37 *Canadian Journal of Criminology* Volume 393 at 401.

The survey found that:

Violence against women by their spouses is widespread in Canada. According to the 1993 Violence Against Women Survey, 29% of the women or 2.7 million who had ever been married or lived in a common law had been physically or sexually assaulted by their partner at some point in the relationship. Such assaults included only incidents where the violent partner could be charged under the Canada's Criminal code. Of women who had been abused by their spouse, 312,000 had experienced the violence in the year before the survey.⁴⁰

The survey revealed that 25% of the women were victimized by strangers and the remaining 43% were victimized by boyfriends, dates, relatives or other men known to the victims. The form of the violence was divided equally between sexual assaults, sexual touching and physical assaults.⁴¹

The most recent statistics on domestic violence in Canada reveal that little has changed since these studies were published. In a statistical profile released on June 11, 1999 by Stats Canada, it was reported that:

According to police-reported data, women were more likely to be victimized by a spouse, either married or common law, than were men. About 31% of all females victims of violence in 1997 were attacked by a spouse, compared with only 4% of all male victims of violence. As a result, 88% of spousal assault victims were women.⁴²

⁴⁰ *Final Report, supra* at note 38 at 2.

⁴¹ R. Gartner and R. Macmillan, *supra* note 39 at 405.

⁴² I. Kulik, "Family Violence: A Statistical Profile 1997," Stats Canada Daily, June 11, 1999, available at Canadian Centre for Justice Statistics.

As explained in Chapter Three, we are also aware that violence which occurs within domestic relationship has numerous possible causes and consequences, including an increasingly violent cycle of abuse. This, coupled with the dramatic under-reporting that is associated with this form of criminal behaviour, helps create an alarming picture.

2. Under-reporting

The Panel reported a concern for the number of incidents of violence that are brought to the attention of the authorities. Without referring to any specific studies the report concluded:

Despite a wealth of research in the area, we have only educated estimates of the prevalence of violence against women in Canada today. No matter what methodology is used, the figures are consistently alarming and most researchers point out, underestimate the incidence of violence.⁴³

This is a complicated and multi-dimensional problem. To begin to understand these complexities, the reasons that attempt to explain the phenomena must be explored. One study attempted to examine the factors that affect under-reporting. Rosemary Gartner and Ross Macmillan studied the significance of the parties relationship on the reporting of violent crimes against women.⁴⁴ Based on the data from the 1993 Canadian Violence Against Women Survey they found that all forms of violence perpetrated against women

⁴³The Panel, *supra* note 13 at 8.

⁴⁴R. Gartner and R. Macmillan, "The Effect of Victim - Offender Relationship on Reporting Crimes of Violence Against Women" (1995) 37 *Canadian Journal of Criminology* 393. See also C. Burris and P. Jaffe, "Wife Abuse as a Crime: The Impact of Police Laying Charges" (1983) 25 *Canadian Journal of Criminology* 309.

were under-reported with only 15% of incidents brought to the attention of the authorities⁴⁵ and that “violence by known offenders is much less likely to come to the attention of the authorities than is violence by strangers.”⁴⁶ This position was explained by the nature of the questions asked by the survey. Specifically, the researchers highlighted that respondents were asked about their victimization and not about a particular incident. They noted that, as revealed in the survey, 63% of the women reported that they had been victimized more than once and 30% reported that they had been victimized four or more times.⁴⁷ These numbers lead to the conclusion that the estimates of under-reporting could be significantly more substantial. For example, the researchers examined the survey’s estimate of 23.7% of the women whose victimization ever becomes known to the authorities. Regarding this percentage, they noted:

It does not tell us the percentage of incidents of spousal violence that police learned about, because some woman are victimized many times by their spouses. If we assume that on average each victim of spousal violence was victimized five times, the percentage of spousal incidents reported to the police could be as low as 5%, or less than the percentage for any other victim-offender relationship.⁴⁸

The explanations for this under-reporting are numerous. They include the victims fear of

⁴⁵*Ibid.* at 405.

⁴⁶*Ibid.* at 418.

⁴⁷*Ibid.* at 406.

⁴⁸*Ibid.* at 406. Note that estimate of 5 times was acknowledged by the researchers as a crude estimate based on data from the survey. They were also able to determine from the survey that only 7% of the women reported only one incident and contacted the police (see notes 11 and 12 at 424 and tables 1 and 2 at 405 and 407 respectively).

reprisal from the male batterer, feelings of shame and degradation, feelings of responsibility and low self esteem, a sincere hope that the male's behaviour can and will be changed, the economic factors that make the victims feel trapped in the relationship and they worry that they will not be believed.⁴⁹

A sociological explanation was proffered by D. Black. It was his view that because of the nature of ongoing relationships between people they are less likely to get the police involved. This was theorized because of the continued need for interaction and intimacy between the parties as well as the availability of less expensive and less formal options. These options included extended familial groups. These same restrictive principles obviously do not apply to strangers and thus explains why stranger - victim offences are more likely to be reported to the authorities.⁵⁰

A feminist framework analysis of the under-reporting disagrees with the sociological presumption "that the behaviour of law can be studied apart from the motivations or interests of individuals and without reference to the purpose, value, or impact of law. Feminist perspectives are also at odds with what are seen as de-gendered and de-

⁴⁹The Panel, *supra* note 13 at 8.

⁵⁰D. Black, *The Behaviour of Law* (New York: Academic Press, 1976); and D. Black, "Social Control as a Dependent Variable" in D. Black ed., *Toward a General Theory of Social Control* (New York: Academic Press, 1984) as cited in R. Gartner and R. Macmillan, *supra* note 44.

contextualized rational choice models of victim decision making.”⁵¹ Thus, feminist theory would explain the likelihood of decreased reporting in intimate relationships for two reasons. The first is that victims of domestic violence are less likely to perceive the assaultive behaviour as criminal conduct. This recognition results from a specific male dominated construction of knowledge about intimate relations and a more general male dominated construction of reality.⁵²

From these constructions it is postulated: that both men and women perceive domestic violence as less serious than stranger violence; that domestic relationships are private and intimate by nature, so to bring the violent abuse to the attention of the authorities would result in embarrassment, shame and a termination of the relationship.⁵³ As well, if a woman was to consider contacting the police and thereby making the incident a public matter, a second process discourages this option for help. R. Gartner and R. Macmillan suggest other life experiences are considered and a conclusion is reached about the costs of such public action. Regarding this rationale these two researchers proposed:

These costs and benefits reflect gender differences in power, not simply inevitable and gender-neutral costs of resorting to the law. Feminist analysts argue that women choose not to call the police because they know (from their own life experiences) that they may not be taken seriously. may be blamed for their victimization, may incur the wrath of their victimizer, family, or friends, may not be able to control the legal process once it

⁵¹R. Gartner and R. Macmillan, *supra* note 44 at 397.

⁵²*Ibid.* at 397. See also C. MacKinnon, “Feminist, Marxism, Method and State: Toward a Feminist Jurisprudence,” 1983, 8 *Journal of Women in Culture and Society* at 635 - 658.

⁵³*Ibid.* at 397.

decides to treat the incident as a “real crime,” may lose their home and children, and, ultimately, may not be protected from further violence.⁵⁴

Therefore, although the two theories differ in their supporting rationale, they both predict the same outcome, specifically that female victims of violence incurred in an intimate relationship are less likely to become involved in the criminal justice system than other female victims of stranger violence.

More importantly, through this review of potential explanations, a need for a contextual appreciation of the interrelationship of the variables that have been linked to the under-reporting of domestic assaults is highlighted. Efforts have been made in this work to depict components of the criminal justice system that continue to create hurdles for women who wish to turn to the justice system for a fair and just dispute resolution but fail to do so for a number of reasons. Regardless of these reasons, it is argued in this thesis that a refusal by physically abused women to access the criminal justice system is an indication of its failure to adequately respond to the unique problems of domestic assault victim. It is postulated that access not exercised for systemic reasons is access denied. Furthermore, denied access to justice is a primary example of a gender based inequality. These issues are examined in both chapters three and four of this thesis.

⁵⁴*Ibid.* at 398. See also R.E. Dobash and R.P. Dobash, *Woman Violence and Social Change* (London: Routledge, 1992); J. Hanmer, J. Radford, and E. Stanko, *Women, Policing and Male Violence* (London: Routledge, 1992); P. Pincard, *The Omitted Reality: Husband - Wife Violence in Ontario and Policy Implications for Education* (Maple, Ontario: Learners Press, 1982); L. Rouse, R. Breen, and M. Howel, “Abuse in Intimate Relationships: A Comparison of Married and Dating College Students,” 1988, 3 *Journal of Interpersonal Violence* at 414 - 429. All as cited in R. Gartner and R. Macmillan, *supra* note 44.

(E) Theory

As outlined above, this thesis examines the criminal justice system's treatment of female witnesses as they come before the courts as complainants of harm caused to them by the alleged criminal conduct of another party. What is it about the gender of sexual assault and domestic assault complainants/witnesses that connects them to an unequal access to justice? Perhaps it has less to do with any particular thing about these individuals that warrants careful review, but rather it has more to do with how the criminal justice system's rules of law and court processes consider the situations that brings them to court in the first place. It is the hypothesis of this project that a component of the problem is that the courts have failed to adequately consider the legal issues set out above within their proper context. That equal treatment of these witnesses and their demands for criminal justice requires the courts to contextualize their issues, and not necessarily exclusively within an envelope of gender, but also within broader social, psychological and economic contexts.

For example, with regards to the rights of privacy that all members of our community have to their counselling and/or therapeutic records, the courts have failed to give sufficient weight to the affect that an intrusion into a complainant's therapeutic records has on both the witness as well as society as a whole. More specifically, the potential harm which flows from such an intrusion to the individuals directly involved and to the public generally must be considered. There is a chilling effect connected with such

invasions of privacy, in addition to a decreased effectiveness of our criminal justice system's ability to determine facts and, if appropriate, deter those criminally responsible from harming again. To improve women's access to justice and equality these matters must be addressed. Moreover, the reforms required to improve this situation will warrant a contextual appreciation of all the issues, before the courts can effectively embark on a balancing process to give effect to the irreconcilable rights of the accused to full answer and defence and the complainant's right to privacy. More importantly, once the potential harms are at least addressed, it will be postulated that there is no room for the considerations of stereotypical myths and beliefs as relevant factors when determining whether or not records should be opened, reviewed and then disclosed to the very individual(s) alleged to have caused the harm that created the need for counselling in the first place.

Similarly, with regards to occurrences of domestic assault, the criminal justice system needs to contextualize the complicated nature of the problem so that a witness's recantation of a complaint can be considered in the most complete light as is possible. This will allow for an extension of the fundamentals created in the case law that have adopted a more principled approach in the assessing of the relevance and admissibility of reliable and necessary evidence that was once described as inadmissible hearsay by our courts. Or, in the alternative, if one believes that the forcing of the trial process against the wishes of the complainant may be inappropriate in some instances, then our criminal justice system needs to create other options. The alternatives provided for within a

community based restorative justice scheme are examined in chapter four. It is argued here that dramatic improvements are warranted, such as the educating and counselling of the parties to ensure the abuse, oppression and violence against all women comes to an end.

It is stressed that the one underlying theme in the conventional response of the criminal justice system to these two problems is a failure to contextualize the unique issues that affect female victims of violent crime within their broader social realities. But what is meant by the term contextualize? As well, if it is argued that any meaningful reforms implemented must be cognizant of these matters and account for the interrelationships of the factors that create the problems identified, how then does one place the issues within their proper context?

The Canadian courts have, in the past, relied on the notion of context in their attempts to interpret legal policy, particularly in their efforts to set constitutional legal principles. For example, in *R. v. Big M Drug Mart*⁵⁵ the corporate respondent tested the constitutional validity of the *Lord's Day Act*.⁵⁶ The Supreme Court of Canada held that the legislation in question did infringe upon the respondent's section 2 (a) Charter right, the guarantee of the freedom of conscience and religion. In its determination of the issue, the majority of the Court, considered the broad legislative history of the law, the language used to

⁵⁵(1985), 18 C.C.C. (3d) 385 (S.C.C.).

⁵⁶R.S.C. 1970, c. L-13.

articulate the right, other international jurisdictions treatment of the matter, and attempted to reveal the law's purpose and effect.⁵⁷ Dickson J., writing for the majority, declared that purpose of the legislation could only be ascertained by examining "the character and the larger objects of the Charter itself." Moreover, with regards to the Charter itself he emphasized that it was not enacted in a "vacuum" and as such it must be placed "in its proper linguistic, philosophical and historical contexts."⁵⁸ This analysis established a test that would require courts interpreting statutes to contemplate the particular law in question within a broad context, that would, over time, push judges beyond an abstract approach to determining legislative meaning.

This principle was advanced further in the case of *Edmonton Journal v. Alberta (Attorney General)*.⁵⁹ In this case the Supreme Court of Canada held that section 30(1) of the *Judicature Act*,⁶⁰ that limited the matters that could be published about court proceedings involving matrimonial disputes and civil proceeding pre-trials generally, contravened the publisher's freedom of the press. The Court went on to hold that such a limit was an unreasonable one under section 1 of the Charter. Wilson J., concurring with the majority, noted that there were two possible approaches that could be taken to ascertain the Charter's application to a challenged piece of legislation; the "abstract approach" or the

⁵⁷*R. v. Big M Drug Mart Ltd.*, *supra* note 55 at 403 to 417.

⁵⁸*Ibid.* at 424.

⁵⁹(1989), 64 D.L.R. (4th) 577.

⁶⁰R.S.A. 1980, c. J-1.

“contextual approach.”⁶¹ For either test the analytical strategy was the same; a court would be required to identify the “underlying value which the right alleged to be violated was designed to be protected.”⁶² Also, both approaches mandated that an interpreting court had to establish the legislative purpose of the impugned law. Praising the values of the contextual approach Wilson J. wrote:

One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that the freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under section one.⁶³

Since its advent into the Canadian courts judicial process,⁶⁴ scholars have theorized about contextualism and its role in the promotion of women’s equality. For example, C. Boyle has urged judges and lawyers to adopt a more contextual approach to better familiarize themselves with the situations and experiences of women so that laws can be formulated

⁶¹*Ibid* at 581. Wilson J. identifies the approach taken by Cory J., Dickson C.J.C. and Lamer J. concurring, as an abstract analysis of the issues.

⁶²*Ibid* at 581.

⁶³*Ibid.* at 584. The values in conflict in this case were the right of the public to an open court process and the freedom of the press to publish what transpires in those courts and the rights of the litigants to the protection of their privacy in matrimonial cases.

⁶⁴For an excellent review of the Canadian’s courts use of contextualism see S. Sugunasiri “Contextualism: The Supreme Court’s New Standard of Judicial Analysis and Accountability” [unpublished] Dalhousie University, Halifax Nova Scotia, August, 1998.

in a manner that more accurately reflects the conditions of women in a violent society.⁶⁵

On the topic of a feminist approach to criminal defences, specifically regarding expert evidence, she speaks of the need for courts to “make themselves familiar with the individual situation, the societal context, and with perspectives that challenge their own intuitive view of the facts.”⁶⁶ Similarly, on her analysis of the “imminent attack” doctrine connected with the principle of self defence within the realm of domestic violence she urges a contextual understanding of the broader issues, writing that:

A feminist analysis in contrast would encourage the asking of the *Whynot*⁶⁷ non-questions in an attempt to understand the realistic choices faced by a women in such a situation, *before* a decision was made about criminal responsibility. This relates to the method by which that [sic] difficult questions should be approached. When a feminist analysis is used, it is possible to see as relevant things that we know about the experiences of battered women, the responses of the police, the comparative sizes and

⁶⁵Boyle, C., “A Feminist Approach to Criminal Defences” as cited in R. Devlin, ed. *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications Ltd., 1991).

⁶⁶*Ibid.* at 280.

⁶⁷*R. v. Whynot* (1983) 9 C.C.C. (3d) 449. Jane (Whynot) Stafford killed her husband while he was asleep in his truck. She was charged with murder. Prior to this act, the deceased had made a number of threats to Stafford. At the trial evidence was called to support the position that he had been a very violent man and was capable of carrying out his threats to kill Stafford’s family if she ever left him. The trial judge left with the jury the option of self defence. She was acquitted. The Nova Scotia Court of Appeal overturned the acquittal, holding that at the time of the killing there was no imminent danger of attack and therefore self defence should not have been left with the jury. At the second trial Stafford pled guilty to manslaughter and was sentenced to 6 months in custody. In *R. v. Lavallee* [1990] 1 S.C.R. 852, the Supreme Court of Canada specifically disapproved the imminent attack requirement. The Court allowed expert testimony to be considered to determine the reasonableness of a “battered wife’s” belief that the only way to save her own life was to kill her batterer. The expert evidence was determined to be relevant, although not determinative of the issue reasonableness relating to an accused’s self defence perceptions and actions.

strengths of men and women, and the realistic economic choices of women [emphasis hers].⁶⁸

It is submitted here that the same concepts that C. Boyle writes about in terms of self defence can be applied to some of the issues associated with female prosecution witnesses who come before the courts alleging they have been violently victimized by their male partners. For example, it is argued that the entire abusive experience should be considered by the court in determining issues of reliability if, at the time of the trial, the witness recants her earlier recollections of the originally alleged domestic violence. An appreciation of the entire abusive experience will require the criminal justice system to locate the violence and its effects in its relational affinity to a number of different possible causes and consequences.

In a similar vein, M. Eberts promotes the need to establish a female perspective within trial advocacy. She describes it as “the work of putting before the courts the facts of women’s lives as women see them.”⁶⁹ This process of contextualization to support equality encourages exposing in the legal system “unseen maleness, and attempt to deconstruct it, in order to make room for the view points, the concerns and the experiences of women.”⁷⁰ To further her position she reviews a passage from *R. v.*

⁶⁸*Ibid.* at 278.

⁶⁹M. Eberts, “New Facts for Old: Observations on the Judicial Process” in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications Ltd., 1991) at 469.

⁷⁰*Ibid.* at 469.

*Morgentaler*⁷¹, writing:

Even women lawyers who believe in women's equality can be caught up in the affirmation of the male vision of the world. As Madame Justice Wilson points out in *R v. Morgentaler*, the more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. It has not, she points out, been a struggle to define the rights of women in relation to their special place in the social structure and in relation to the biological distinction between the two sexes. The contemporary move, by contrast is to translate 'women's needs and aspirations' into protected rights and assert 'her dignity and worth as a human being.'⁷²

It is her position that a modern liberal notion of equality, particularly that all individuals should simply be treated the same, does not promote true fairness and impartiality. As such, she proposes that as judges and lawyers attempt to create an "official version of reality" they should do so without submerging the realities of women's lives into stereotypes and uniquely male perspectives.⁷³ Building on this perspective, it is argued here that, in instances of applications for the disclosure of a sexual assault complainant's therapeutic or counselling records the courts need to fully and contextually appreciate the broader societal and the gender specific issues interconnected with the legal issues placed before them. For example, the courts must not only consider the amount of individual harm caused to the complainant whose private counselling record are opened, but they must also consider the chilling effect that such invasions will have on other victims of

⁷¹*R. v. Morgentaler*, [1988] 1 S.C.R. 30.

⁷²M. Eberts, *supra* note 69 at 469.

⁷³*Ibid.* at 473 and 490.

sexual violence willingness to come forward to the criminal justice system with their complaints.

Support for this theory can be found in Canadian jurisprudence assessing equality rights as established in section 15 of the Canadian Charter of Rights and Freedoms.⁷⁴ In *Andrews v. The Law Society of British Columbia*⁷⁵ considered the constitutionality of section 42 of the *Barristers and Solicitors Act*⁷⁶ that imposed a citizenship requirement for admission into the legal profession. Andrews was a permanent resident in Canada and met all the other requirements needed to practice law. Being prevented from practicing law by the citizenship requirement, he challenged the law arguing it violated his guaranteed right to equality. The Court agreed and held the rule that barred an entire class of persons, specifically non-citizens, from certain forms of employment violated section 15 of the Charter. In their determination of the issue as to whether or not a member of the public fell within a group of persons enumerated in section 15, the Court established a two-fold test. Courts would be required to consider both the law subject to the challenge, and the place of the group within the social, political and legal fabric of society challenging the law. In other words the Court was concerned with the application of the

⁷⁴ Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c.11 [hereinafter “Charter”].

⁷⁵ *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.).

⁷⁶ R.S.B.C. 1979, c. 26, s.42.

law.⁷⁷ Wilson J., wrote for the majority in it's final determination of the issues, but agreed with McIntyre J.'s position as to the way that section 15 of the Charter should be interpreted and applied.⁷⁸ On the issue of equality McIntyre J. wrote:

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.⁷⁹

Furthermore, he rejected the classic modern liberal notion of equality, that all people should be treated the same, stating that:

It is, of course obvious that legislatures may - and to govern effectively - must treat individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different rules regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.⁸⁰

Approximately three months later, the Supreme Court of Canada was able to revisit the interpretation of section 15 of the Charter. In *R. v. Turpin*,⁸¹ Sharon Turpin and two other

⁷⁷*Ibid.* at 10.

⁷⁸*Ibid.* at 31.

⁷⁹*Ibid.* at 10.

⁸⁰*Ibid.* at 13.

⁸¹*R. v. Turpin*, [1989] 1 S.C.R. 1296.

individuals were charged with first degree murder in the province of Ontario. The sections of the Criminal Code⁸² that required the accused to be tried by a judge and jury, were challenged as unconstitutional, in part because the province of Alberta allowed for a judge alone trial in similar circumstances. The trial judge allowed the application, and the trial was conducted before a judge alone. Turpin was acquitted and the other two co-accused were convicted of second degree murder. The Ontario Court of Appeal held that the trial judge conducted the trial without jurisdiction and set aside all three verdicts and ordered a new trial for all three parties. The Supreme Court dismissed the appeal, holding that the accused were denied equality before the law as they were treated more harshly than those individuals charged with the same offences in Alberta. However, the Court went on to proclaim, such a distinction was not discriminatory in its purpose or effect and, therefore, the legislation that mandated a trial by judge and jury did not violate an accused's rights as guaranteed by section 15 of the Charter.⁸³ On the issue of context and the notion of equality, Wilson J., writing for the Court stated:

If the larger context is not examined, the section 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation. A determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge is likely, in my view, to result in the same kind of circularity which characterized the similarly situated similarly treated test clearly rejected by this Court in *Andrews*.⁸⁴

⁸²Criminal Code, R.S., c. C-46, sections 427, 428 and 429.

⁸³*Ibid.* at 1331.

⁸⁴*Ibid.* at 1332.

More recently in the *Eldridge Case*⁸⁵ the Supreme Court of Canada assessed the Charter's section 15 equality guarantees within the context of equal access to medical services. In particular, three deaf individuals brought an action against the British Columbia provincial government for failing to provide funding for sign language interpreters for the deaf while receiving medical services. They argued that failing to provide such services impaired their ability to communicate with their doctors and this effectively equated to an unequal level of medical services. The Supreme Court agreed and held that the legislation that did not accommodate equally for the deaf was unconstitutional and could not be justified as a reasonable limit within a free and democratic society. The Court referred to much of its earlier reasoning articulated in *Andrews*, including the need "to look not only at the impugned legislation .. but also to the larger social, political and legal context."⁸⁶ In Chapter Two, this thesis will examine to what level and to what extent the courts have analysed the issues surrounding the disclosure of female complainants' therapeutic or counselling records within such a contextual framework. Similarly, in chapter three prosecutorial responses to domestic assault charges will be scrutinized to review the level of contextualization that is employed by the criminal justice system, when dealing with these types of charges.

Also, the Court voiced a concern for the form of discrimination based in stereotypical thinking. Although the Court was specifically referencing societal biases against the

⁸⁵*Eldridge v. British Columbia (Attorney General)* (1997), 151 D.L.R. 577 (S.C.C.).

⁸⁶*Ibid.* at 613.

disabled, it is suggested that the principles articulated are universally applicable to any form of discrimination anchored in inaccurate stereotypical thinking. Specifically, the Court considered the broader social context that the disabled must face daily:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions.⁸⁷

Most recently, the Supreme Court of Canada has had an opportunity to review these principles. In *Law v. Minister of Human Resources Development*, a 30 year old woman, without dependent children or disability, was denied survivor's benefits under the Canadian Pension Plan. For persons such as Ms. Law, the Plan gradually reduces the survivor's pension by 1/120th of the full rate of the return for each month that the claimant's age is less than 45, as determined at the time of the contributor's death.⁸⁸ The appellant argued that sections of the Plan that limited her amounts payable based on her age violated her section 15 equality rights, as guaranteed by the Charter. The Supreme Court of Canada disagreed with the appellant and, in the process, established a detailed guideline for lower courts to assess the validity of alleged section 15 Charter violations.

⁸⁷*Ibid.* at 613.

⁸⁸File No.: 25374, judgement March 25, 1999. The constitutional question in this case was whether sections 44(1)(d) and 58 of the Canada Pension Plan, R.S.C., 1985, c. C-8, infringed section 15(1) of the Charter on the ground that they discriminate on the basis of age against widowers and widows under the age of 45? The Court held that the sections did not create a Charter infringement.

Iacobucci J., writing for the majority, set out 10 points to be followed in such inquiries. These guidelines included a discussion of the general approach to these types of inquiries, their purpose, and the requirement for the courts to embark on both a comparative and a contextual analysis of the issues.

With regards to the general approach, Iacobucci J. determined that the nature of a section 15 equality determination could not be fixed in an exact formula. He confirmed the Court's earlier rulings and held:

In accordance with McIntyre J.'s caution in *Andrews, supra*, I think that it is sensible to articulate the basic principles under s. 15(1) as guidelines for analysis, and not as a rigid test which might risk being mechanically applied. Equality analysis under the *Charter* must be purposive and contextual.⁸⁹

Next, he reiterated the purpose of the equality guarantee. On this issue he wrote:

It may be said that the purpose of s.15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.⁹⁰

Helpfully, the notion of human dignity was expanded upon. Specifically, Iacobucci J. noted that:

Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular

⁸⁹*Ibid.* at 6.

⁹⁰*Ibid.* at 13.

law.⁹¹

As well, the Court re-emphasized that the equality guarantee is a comparative concept, that requires a court to establish one or more relevant comparators. The recognition of a comparison group requires the court to examine the subject matter of the law and its effects within a full appreciation of its “contextual factors.”⁹²

The Supreme Court articulated four such contextual factors, although they are presented as examples of an open category. Any one factor may suffice in the determination of an inequality. The first factor is a “pre-existing disadvantage.” This classification of a contextual factor includes a vulnerability, stereotyping or prejudice experienced by the specific group or an individual.⁹³ The Court stressed the importance of the need for the supreme law of the land to protect vulnerable, disadvantaged, or members of minority groups. The second factor is the “relationship between the grounds and the claimant’s characteristics or circumstances.” The focus of this factor is the relationship between the ground on which the claim is made and the actual need, capacity or circumstance of the claimant. An example presented within this category is the gender of the claimant.⁹⁴ The

⁹¹*Ibid.* at 13.

⁹²*Ibid.* at 14.

⁹³*Ibid.* at 15. A stereotype was defined as “a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess.”

⁹⁴*Ibid.* at 16. See also *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

third factor described was the “ameliorative purpose or effects” of the law in question upon a disadvantaged person or group within society. This improvement factor was described to be potentially more relevant in circumstances where a claim is brought by a “more advantaged member of society.”⁹⁵ The last factor outlined was the “nature of the interest affected.” To elaborate on this classification Iacobucci J. relied on the rationale and words used by L’Heureux-Dube J. in *Egan v. Canada*,⁹⁶ particularly:

if all things are equal, the more severe and localized the ... consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s.15 of the *Charter*.⁹⁷

He went on to conclude:

that the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question.⁹⁸

Thus, from a theoretical perspective, the notion of assessing the issues connected to claims of inequality within a broad social context has significant scholarly and judicial support. It is suggested that the connecting theme in these materials is that a fair, just and equal appreciation of these legal issues requires that the judges deciding the fate of the litigants must consider not only the impact that their decisions will have on the claimants

⁹⁵*Ibid.* at 16. See also *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

⁹⁶[1995] 2 S.C.R. 513.

⁹⁷ *Law v. Minister of Human Resources*, *supra* note 88 at 17.

⁹⁸ *Ibid.* 17.

that bring these matters forward, but also social realities of those claimants. It is the goal of this thesis to test how, if at all, the criminal justice system has done at contextualizing women's lives as they come before the courts as prosecution witnesses. This is accomplished by applying this theoretical framework to two critically relevant problems found within the criminal justice system; firstly, the disclosure of female complainants' therapeutic records in cases involving allegations of sexual assault and secondly, the prosecution of domestic assault cases.

(F) Review of Methodology

1. Sexual Assault Complainant's Therapeutic or Counselling Records

Understanding of the current state of the law as it relates to the topic of the disclosure of a sexual assault complainant's therapeutic and or counselling records is critical to this work. The evolution of this legal process will be discussed in a chronological manner, starting with the *O'Connor Case*.⁹⁹ The laws reactions to this case, including the legislative response¹⁰⁰ and the constitutional challenges that followed it's advent are reviewed. In a effort to further analyse the extent to which the Canadian courts have contextualized this issue, this thesis examines the compendium case to *R. v. O'Connor*,

⁹⁹*R. v. O'Connor* (1994), 89 C.C.C. (3d) 109 (B.C.C.A.).

¹⁰⁰Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c.30.

L.L.A. v. Beharriell.¹⁰¹ As well, a brief review of the Supreme Court of Canada's response to a civil law challenge by a respondent for a plaintiff's counselling records is undertaken.¹⁰² Throughout this work efforts will be made to focus on the state of the law within the theoretical framework of equality as described within a contextual back drop.

Part of this discussion will include two components of societal harm. The first is the harm suffered by the individuals whose therapeutic records are opened and their counselling treatment is interfered with. The Court's treatment of the reports filed in the *Mills Case*,¹⁰³ that speak to the issue of complainant harm that flows from an invasion of their private counselling records are discussed. Through these reports it is argued that, in large measure, the courts have to date failed to properly contextualize the applications for this type of disclosure, primarily within a gender view point and secondarily within a victim of crime perspective.

The second matter explored is the societal harm that flows from the chilling effect that the opening of such records might have on other women who have been sexually attacked but decide not to come forward to the authorities to have their complaints investigated. If women are deterred from accessing justice through the criminal justice system, it is pointed out that there are at least two ramifications that flow from this. The first is that it

¹⁰¹*L.L.A. v. Beharriell* (1995), 103 C.C.C. (3d) 92 (S.C.C.).

¹⁰²*A.M. v. Ryan* [1997] 1 R.C.S. 157 (S.C.C.).

¹⁰³*R. v. Mills* (1997), 205 A.R. 321; 207 A.R. 161 (Alta. Q.B.). On appeal to the S.C.C.

effectively denies sexual assault victims and the community with access to justice. The second is that if the women that have been injured in this way do not come forward an opportunity is lost to deter this form of criminal behaviour that helps to oppress and violate all women's rights to equality.

As well, it is important to note that this matter has a relevance beyond just the constitutionality issues of the legislation dealing with the issue of disclosure of these records, that may manifest itself in two ways. One is that if the Supreme Court declares Bill C-46 as unconstitutional then the drafters of the replacement legislation will need to continue to assess these issues as they grapple with the balancing of competing interests of the parties connected to these types of motion. In the alternative, if the legislation is upheld, Canada's courts will continue to interpret Bill C-46 to assist them in their just application of the law. This practical application of the law will require a contextual appreciation of all of the issues involved with these motions for disclosure.

2. Domestic Assault

To properly assess the methodologies used to examine the area of domestic assault, the proposals for reform must first be reviewed. In short, it is postulated that the criminal justice system does not effectively deal with the problem of domestic violence. Provincial governments charged with responsibility of administering justice have two options to

improve the *status quo*. The first is to increase the effectiveness of the trial's process to search for the truth by implementing vigilant investigative techniques that preserve evidence as clearly as possible. One such technique could be the immediate videotaping of a complainant's statement. This could eventually assist prosecutors in the presentation of reliable evidence that could allow for the expansion of the principles articulated in a series of cases dealing with the issue of the admissibility of hearsay evidence.¹⁰⁴

This option is examined through a doctrinal approach of the current state of the law and an analysis of its principles which leads to an argument for the expansion of the principles outlined above. As well, this position is supported in both empirical and non-empirical interdisciplinary forms of research, that will help explain not only the scope of the problem from a sociological perspective, but also from some psychological theories that help explain the phenomena of the reluctant or recanting witness. This is examined so that the gender issues unique to domestic violence can be better understood within their complicated and layered context. For example, this work has reviewed a series of articles on the symptoms of the cycle of domestic violence to support the argument that there is a need to push for the contextualization of the human behaviour patterns associated with domestic violence, so that the trial process of the search for the truth can be balanced with the concepts of due process and an accused right to fundamental justice.

¹⁰⁴See *R. v. Khan* (1990), 89 C.C.C. (3d) 92 (S.C.C.); *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.) ; *R. v. KGB*, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257 ; *R. v. U.(F.J.)*, (1995), 101 C.C.C. (3d) 97 (S.C.C.).

In this thesis an alternative to the conventional approach of the criminal justice system towards domestic violence is also examined. The philosophies of a community based restorative justice scheme, allowing for the principles of shaming, education and counselling to replace punishment as a deterrence to this reprehensible male behaviour, are also reviewed. Following a discussion of the possible causes and consequences of this form of violence, an effort has been made to suggest a comparative effectiveness between the two options, given the power imbalances and safety risks unique to incidents of domestic assault.

CHAPTER TWO: THE DISCLOSURE OF SEXUAL ASSAULT COMPLAINANTS' RECORDS

(A) Introduction

This chapter examines the law in Canada as it relates to the disclosure of sexual assault complainants' therapeutic and counselling records in the possession of third parties. It also reveals some of the complexities connected with one method of how a criminal law is created in Canada. This topic has been selected to advance the position that the criminal justice system has failed to treat female complainants equally. It is argued in this chapter that this inequality is anchored in a failure to contextualize the consequences for women that flows from the disclosure of these types of materials.

To begin, a straightforward premise is suggested: our society must create laws to prevent the harm that flows from sexual violence and abuse. Once such laws are established, a procedural process must be implemented to ensure that those persons alleged to have breached such laws are dealt with and treated fairly by our criminal justice system. This is one of the protections ensured through the principle of due process. Yet, as we contemplate the rules associated with the disclosure of a sexual assault complainant's therapeutic records to an accused person, we quickly see the dilemma that arises because of the competing interests and guaranteed *Charter* rights of those individuals involved. The classic liberal notion of minimal state intervention that is balanced against the potential for societal harm is revealed, except in this case, the potential harm cuts in two different directions. The first inherent harm is obvious; the wrongful conviction of an

innocent person. The second likely harm is the subject matter of this chapter. It examines the harm that flows from the invasion of one's highly personal records, as well as the effect this law has as a disincentive for all victims of sexual assault to access justice through the criminal courts. This denied access represents a serious form of inequality that directly acts to oppress female victims of violent sexual offences and indirectly all women.

Related to this issue, we are able to observe the two different branches of government authorized to create laws and apply laws in conflict over the appropriate balance to be struck between these competing interests. In the *O'Connor*¹ Case we see the courts responding to a specific fact situation, in the absence of applicable legislation, and determining legal policy in the process. Next, the legislators, who in the meantime had been contemplating a legislative response to this disclosure issue, with extensive input and consultation with a number of non-legislative bodies, conclude there are certain shortcomings with the Supreme Court majority's viewpoint and therefore introduce a section in the Criminal Code to readjust the balance between the competing interests. This begins a continuing checks and balances process as the courts scrutinize the constitutionality of the new legislation. This engagement will come to a head in the *Mills*² Case. In this case, the legislation enacted to deal with the issue of an accused person's right to obtain the therapeutic records of a complainant in a sexual assault case and the

¹*R. v. O'Connor* (1996), 103 C.C.C. (3d) 1 (S.C.C.).

²*R. v. Mills* (1997), 205 A.R. 321; 207 A.R. 161 (Q.B.), on appeal to the Supreme Court of Canada.

corresponding rights and issues of privacy and equality before the law of the complainant, is tested predominately because the legislators relied on portions of the Supreme Court's minority view in the *O'Connor case* that was directly rejected by the majority.

To further complicate matters, at the very heart of this whole process is a gender conflict. This gender component plays a large part in the formation of this law created to address the disclosure of a female complainant's therapeutic records, as evidenced by the language used by the courts to assess the issue. Specifically, as one closely reviews the language used by the courts, a troubling picture is revealed: that some of the same biases and stereotypes debunked in the rape shield legislation,³ continue to be assessed and relied upon in tipping the balance in favour of the male accused person's right to full answer and defence over the female complainant's right to privacy, equality and security of person.

Finally, to advance the argument that women's equality rights have not always been thoroughly assessed within a contextualized framework *L.L.A v. Beharriell*,⁴ decided at the same time as the *O'Connor Case*, will also be examined. This case reviews the Supreme Court's policy consideration of one solution to the potential harm that flows from the disclosure of these materials, specifically a class privilege for counselling records. As well, both of these procedural and substantive criminal law cases will be compared to the Canadian civil jurisprudential treatment of the disclosure of therapeutic or counselling

³*Criminal Code*, R.S., c. C-46, sections 276 and 277.

⁴ *L.L.A. v. Beharriell* (1995), 103 C.C.C. (3d) 92 (S.C.C.).

records issue. This will be done to assess the Supreme Court's contextual considerations of the competing rights of the accused and the sexual assault complainant. Additionally, these cases mark the evolution of the equality rights of the complainants connected to these disclosure applications.

(B) R. v O'Connor

O'Connor, a Roman Catholic bishop, was charged with a number of sexual offences, alleged to have occurred when he was a priest at a First Nations residential school. The allegations dated back some 15 years prior to the charges being laid and involved a number of students at the school. Prior to the trial date, counsel for the accused applied to the court for an order demanding that the complainants authorize all therapists, psychologists, and psychiatrists who treated them to produce copies of their complete records. O'Connor also requested all school and medical records from the school where the sexual assaults were alleged to have taken place. Neither the complainants nor their care providers were given notice of this application. The application was granted and a disclosure order was made. The case was then adjourned several months.

On the next trial date, counsel for the accused brought a second series of motions and applied for a stay of proceedings. The stay application was dismissed. However, during the course of the testimony it became clear that other material related to the original order existed and had not been disclosed. Counsel renewed their stay application and, on this

occasion, it was granted.⁵

1. British Columbia Court of Appeal

The matter was appealed to the British Columbia Court of Appeal. The Court allowed the Crown's appeal and ordered a new trial. For perspective, this chapter will briefly review the Court's rulings related to the Crown's failure to disclose the complainant's therapeutic records.

Counsel for the accused asserted a section 7 Canadian Charter of Rights and Freedoms⁶ violation, and argued that the appropriate remedy flowing from such a violation would be stay of proceedings under section 24 of the *Charter*. On the issue of disclosure, the Court held that the Crown has an obligation to disclose and that the accused has a right to all that which the Crown is obligated to disclose. Under the guarantees of section 7 of the *Charter*, the accused had a right to all information that could reasonably and possibly assist him in making full answer and defence. Still, a violation in this regard will only be made out where the accused establishes that the non-disclosure has probably prejudiced or had some adverse effect on his ability to make full answer and defence. Here the accused failed to lay before the Court an evidentiary foundation to assess the relevance of the

⁵*R. v. O'Connor* (1994), 89 C.C.C. (3d) 109 (B.C.C.A.).

⁶ Canadian Charter of Rights and Freedoms, s.7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c.11 [hereinafter "*Charter*"].

requested records.⁷

Within two months, the same panel of the British Columbia Court of Appeal established a procedure for the production and disclosure of therapeutic records in sexual assault cases.⁸

A two step process was developed. The first stage required an accused person to show that the information contained in the medical records is likely to be relevant either to an issue in the proceeding or to the competence of the witness to testify. They held that if the accused can satisfy this test, then the records are to be disclosed to the court.⁹

At this second stage, the court then reviews the records to determine which of them are actually relevant to the defence. If the court were to determine that any of the records fall into the category of “required by the accused to make full answer and defence,” then the records are to be disclosed to the defence, subject to any conditions that the court deems appropriate.¹⁰ To establish a finding of likely relevance the accused would be required to lay an evidentiary foundation. With regards to the initial onus the Court held:

The test to be met by an applicant on the initial application to have the medical records produced to the court is necessarily lower than the test to be applied by the court in deciding whether to release any of those documents to the parties. A less stringent test is appropriate at the first stage since, at the point in time when the application is first made, it is unlikely that anyone other than the witness and the physician, psychiatrist

⁷ *R. v. O'Connor*, *supra* note 5 at 134-149.

⁸ *R. v. O'Connor (No.2)* (1994), 90 C.C.C. (3d) 257 (B.C.C.A.).

⁹ *Ibid.* at 261 and 267.

¹⁰ *Ibid.* at 267 – 268.

or therapist will know what is in the records.¹¹

The Court premised its decision on the societal need to safeguard and protect the privacy interests of a witness, and then balanced those needs against the rights of an accused to make full answer and defence.¹²

Of particular importance was the Court's rejection of the accused's argument for the disclosure on the basis that the documents may be relevant and went on to suggest factors that, on their own, would not be a sufficient foundation for the production of records. The Court held:

The submission that medical records should be produced because they may be relevant to the credibility of a complainant is patently inadequate to justify their production, in the absence of evidence indicating that there is likely to be something in those records relevant to the a particular issue in the case. Invoking credibility at large is not sufficient to justify such an interference with the privacy interests of a complainant.¹³

In coming to this conclusion the Court relied on the comments of Madam Justice Heureux-Dubé, in the case of *R. v. Osolin*¹⁴ and Madam Justice McLachlin's reasoning set out in the case of *R. v. Seaboyer*.¹⁵ The principles set out in these decisions will be discussed in the analysis portion of this chapter.

¹¹*Ibid.* at 261.

¹²*Ibid.* at 261 – 262.

¹³*Ibid.* at 265.

¹⁴*R. v. Osolin* [1993] 4 S.C.R. 595; (1991), 86 C.C.C. (3d) 481 (S.C.C.).

¹⁵*R. v. Seaboyer* [1991] 2 S.C.R. 577; (1991), 66 C.C.C. (3d) 321 (S.C.C.).

2. Supreme Court of Canada

In the Supreme Court, the same competing issues are assessed, specifically the accused's rights to full answer and defence and the complainant's rights to privacy and equality before the law. The majority considered the potential harms connected with the conflicting rights of a witness to privacy and an accused person's right to full answer and defence and aligned the latter with the fundamental tenet of the criminal justice system - that an innocent person must not be convicted. The majority did not address the section 15 equality right issue. Their conclusions have the effect of ranking the accused person's rights over those of the complainant's. It is proposed that, although they do not explicitly endorse such a position, when one carefully reviews the language used to balance the competing interests, coupled with the end result, an argument can be made that a hierarchy of rights does exist. This theme is also elaborated upon in the Constitutional Challenges section of this chapter.

On appeal, the Supreme Court addressed a number of issues, but for the purpose set out in this chapter, I will only discuss those that are connected to the therapeutic records of a complainant. In a 5 : 4 split, Lamer C.J.C. and Sopinka J., wrote for the majority.¹⁶ They held that the intensely private nature of therapeutic records did not affect the Crown's obligation to disclose such materials to the defence, where those materials were

¹⁶*R. v. O'Connor* (1996), 103 C.C.C. (3d) 1 (S.C.C.). Regarding therapeutic records, Lamer C.J.C., Sopinka, J., Cory, Iacobucci, and Major JJ., concurring; L'Heureux-Dubé, J., La Forest, Gonthier and McLachlin JJ., concurring in dissent.

already in the possession of the Crown. They reasoned that once the records had been revealed to the Crown, there was no privacy interest to be balanced against the right of the accused to make full answer and defence. Further, if the Crown were to advance that such records contained nothing relevant, they would have the burden to prove the irrelevance of the records on an application for disclosure by the accused. In other words, once in the hands of the Crown, the records will be presumed relevant and must be disclosed.¹⁷

The minority view on this matter was that the case did not raise the issue of the general extent of the Crown's disclosure obligations regarding a complainant's private records in its possession and, as such, did not feel the need to comment on the issue.¹⁸

On the issue of the procedure for the production and disclosure of therapeutic records in the possession of the third parties, Lamer C.J.C. and Sopinka J. wrote for the majority.

They determined that the balance had to fall in the favour of the accused party.

Specifically, they held that the competing claims of a complainant to a constitutional right

¹⁷ *Ibid.* at 15 – 16, 78 and 91. However, one issue not fully developed by the Court was the issue of consent, and its impact on how the Crown came to be in possession of the records. *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.), sets out disclosure principles related to crown obligations and exceptions. The Crown has a discretion to withhold information which may be subject to privilege and may delay disclosure so as not to impede an investigation. Also, the Crown is not required to disclose what is clearly irrelevant. The general principle is that information should not be withheld if there is a reasonable possibility that the failure to disclose will negatively affect the accused's right to make full answer and defence, unless the non-disclosure is required by the law of privilege. L. Stuesser, in "Reconciling Disclosure and Privilege" (1994) 30 C.R. (4th) 67 at 79, discussed the expansion of *Stinchcombe* mandated Crown disclosure to the right of an accused person to pre-trial "discovery".

¹⁸ *Ibid.* at 25.

to privacy in the information held within the records maintained by a third party must give way to the constitutional guarantees of an accused person to make full answer and defence. The common law that supported this position was set out in *R. v. Stinchcombe*,¹⁹ and *R. v. Seaboyer*,²⁰ including “ the fundamental tenet of our judicial system that an innocent person must not be convicted.”

The Court agreed with the Appellate Court that a two stage process was warranted to process an accused’s request for a complainant’s therapeutic records. However, the majority and the minority of the Court differed in their respective views as to the threshold of relevance, as well as the factors that a trial judge would need to assess such issues.

At the first stage, Lamer C.J.C., and Sopinka J. proclaimed an accused need not establish an evidentiary foundation in every case. In some cases oral submissions by counsel may suffice. At the end of the day, an accused must persuade the judge that “likely relevant” information is contained in the records. They stated:

the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. When we speak of relevance to an “issue at trial” we are referring not only to evidence that may be probative to the material issues in the case (i.e., the unfolding of events) but also to the evidence relating to the credibility of witnesses and to the reliability of other evidence in the case.²¹

The Court continued and held that the “likely relevance” initial hurdle should not be

¹⁹*R. v. Stinchcomb* [1991] 3 S.C.R. 326; (1991), 68 C.C.C. (3d) 1 (S.C.C.).

²⁰*R. v. Seaboyer*, *supra* note 15 at 321.

²¹ *R. v. O'Connor*, *supra* note 16 at 19.

interpreted as an onerous burden on the accused but rather a “requirement to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time consuming request for production.”²²

Additionally, the Court provided further guidance suggesting a timing factor that should be considered when assessing likely relevance. They held:

There is a possibility of materiality where there is a reasonably close temporal connection between the creation of the records and the date of the alleged commission of the offence ...or in cases of historical events, as in this case, a close temporal connection between the creation of the records and the decision to bring charges against the accused.²³

Beyond this, the Court went on to set out a number of examples, by way of illustration only, in which third party records may be relevant:

1. they may contain information concerning the unfolding of events underlying the criminal complaint.
2. they may reveal the use of therapy which influenced the complainant’s memory of the alleged events.
3. they may contain information that bears on the complainant’s “credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since.”²⁴

Once the accused has satisfied the court on the threshold question of likely relevance, the records in question are then turned over to the trial judge. The role of the trial judge at this stage is to assess whether, and to what extent, the records should be disclosed to the accused. The majority recognized the potential for harm to be suffered by a complainant

²²*Ibid.* at 20.

²³ *Ibid.* at 21 – 22.

²⁴*Ibid.* at 23.

but determined that this potential harm must be weighed against the ability of the accused to make full answer and defence. To assist the court in their balancing process, they set out a number of factors for consideration, including:

1. the extent to which the record is necessary for the accused to make full answer and defence;
2. the probative value of the record in question;
3. the nature and extent of the reasonable expectation of privacy vested in the record;
4. whether production of the record would be premised upon any discriminatory belief or bias; and
5. the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question.²⁵

It is important to note that they specifically rejected L'Heureux-Dubé J.'s two additional factors, that a trial judge must also consider. These included:

1. the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and
2. the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome.²⁶

Eventually, the majority established "the societal interest is not a paramount consideration in deciding whether the information should be provided."²⁷

²⁵*Ibid.* at 24.

²⁶*Ibid.* at 24. The majority of the Court held that this second factor was more appropriately dealt with at the admissibility stage of a hearing rather than at the disclosure stage.

²⁷*Ibid.* at 24.

The Court preferred other means to support society's interests in the reporting of sexual assault offences, such as publication bans, closing court rooms to the public and the application of a relevancy test regarding evidence generally.²⁸ However, as an aside, it is suggested that these types of arrangements merely protect against general public scrutiny. They do very little to prevent the invasion of privacy that goes along with the opening of records, and they do nothing at all to relieve the stress and anxiety that sexual assault complainants often feel once confronted by an accused's counsel in cross examination, particularly on information connected with their therapeutic records.

In L'Heureux-Dubé J.'s minority judgement, a number of basic principles are reviewed prior to her addressing the procedure for the production of a complainant's therapeutic records. She recognized additional considerations at the first stage of the process. These included a recognition of some of the broader *Charter* values. More specifically, she noted, "the principles of fundamental justice, including the fairness of the trial, necessarily reflects a balancing of societal and individual rights."²⁹ These rights are tied into section 7 *Charter* guarantees that create presumptions against the production of private records. The balancing of an accused's right to make full answer and defence cannot be interpreted so widely so as to allow a "fishing expedition"³⁰ into the private records of a complainant.

²⁸*Ibid.* at 24. Also note that the rejects L'Heureux-Dubé, J.'s inclusion of these additional factors, preferring the avenues discussed by the Nova Scotia Court of Appeal in *R. v. Ryan* (1991), 69 C.C.C. (3d) 226 at 230. These approaches do not prevent disclosure, but focus on privacy from a public scrutiny perspective.

²⁹ *Ibid.* at 36.

³⁰*Ibid.* at 64.

In fact, she questioned the relevancy of the records generally when assessing the equality rights of a complainant. She would place the burden on the accused to establish a basis that there is in existence material which may be useful to an accused person in making full answer and defence.³¹ Regarding the nature of the records she added:

Similarly, the mere fact that a witness has a medical or psychiatric record cannot be taken as indicative of the potential unreliability of his or her testimony. Any suggestion that a particular treatment, therapy, illness, or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth or prejudice.³²

She concluded that there was a need for the courts to protect such rights that must co-exist along side of those rights guaranteed an accused person.

The minority view proposed certain criteria to be applied to determine the production of a complainant's records, including:

First, production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available and effective alternative means. Second, production which infringes upon a right to privacy must be as limited as is reasonably possible to fulfill the right to make full answer and defence. Third, arguments urging production must rest upon permissible chains of reasoning, rather than discriminatory assumptions and stereotypes. Finally, there must be a proportionality between the salutary effects of production on the accused's right to make full answer and defence as compared with the deleterious effects on the party whose private records are being produced.³³

It should be noted that this last component addressed the needs of the individual

³¹*Ibid.* at 62.

³²*Ibid.* at 65.

³³*Ibid.* at 60 to 61.

complainant, as compared to the general needs of society. Notably absent in this passage is any reference to the potential chilling effect that such invasions of privacy might have on sexual assault victims' willingness to come forward and access justice through the criminal courts. Still, the minority did factor into the consideration process the potential negative side effects that the opening of such records might have on the complainant's course of therapy, in addition to the potential psychological harm that such similar invasions into privacy might have.³⁴

Turning now to the issue of the minority's view of the two stage process, it specifically disagreed with the majority's finding, that the standard of "likely relevance" should not be interpreted as an onerous burden. They preferred to classify the burden on the accused, at this stage, to be a "significant one" and went on to highlight a number of factors that should not be considered as sufficient, on their face, to cause the trial judge to review the records. The assertions that would fall below the mark at the first stage include:

1. An unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is.
2. The applicant cannot invoke credibility at large but must show that there is likely to be information in the impugned records which would relate to a complainant's credibility on a particular material issue at trial.
3. That a prior inconsistent statement might be revealed, or that the defence wishes to explore the records for allegations of sexual abuse by other people.
4. The mere fact that a witness has a medical or psychiatric record cannot be taken as indicative of the potential unreliability of his or her testimony.
5. It must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will

³⁴*Ibid.* at 67. The minority of the Court also held that given that these records are profoundly intimate, their opening alone can have serious consequences for the dignity and treatment course of a complainant.

contain information that is relevant to the defence.³⁵

If the evidentiary foundation presented by the defence falls below the threshold of relevance, then that is the end of the application. However, if the application succeeds past the first stage, then the trial judge must embark on a balancing process. Again the two competing interests, the accused's right to make full answer and defence and the complainant's privacy and equality rights, are assessed. At this point, the court should review the records and order the disclosure of those records, or parts thereof, that have a significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. As well, the court must consider the potential of harm to the privacy rights of the witness or to the privileged relation that witness has with a counsellor.³⁶ In the end, the minority sets out a non-exhaustive list of factors that should be considered in the determination of this process, as discussed earlier in this paper.

On the specific issue of the complainant's right to equality without discrimination as guaranteed by section 15 of the *Charter*, L'Heureux-Dubé J. pointed out three relevant factors. First that 90% of all sexual assault victims are women.³⁷ Second, she referenced a study that suggested between 50% and 80% of women institutionalized for psychiatric disorders have prior histories of sexual abuse.³⁸ Third, it is a common event in today's

³⁵*Ibid.* at 64 to 65.

³⁶*Ibid.* at 67 to 68.

³⁷*Ibid.* at 57; *Osolin*, *supra* note 14 at 521 per Cory J.

³⁸*Ibid.* at 57; T. Firsten, "An Exploration of the Role of Physical and Sexual Abuse for Psychiatrically Institutionalized Women" (1990), [unpublished research paper] available

Canadian society that those who have been sexually assaulted obtain treatment because of their victimization.³⁹

This assessment represents the minority's effort to contextualize the harm component of sexual assault offences into its larger social context. Indirectly, it also positions the victims of such crimes within an enumerated group as envisioned by section 15 of the *Charter*.⁴⁰

This analysis consistent with the jurisprudence enunciated in the *Law* case (decided post *O'Connor*). In *Law* the purpose of section 15 was set out by Iacobucci J.:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.⁴¹

from the Ontario Women's Directorate.

³⁹*Ibid.* at 57.

⁴⁰*Supra* note 6, section 15(1) "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

⁴¹*Law v. Canada (Minister of Employment and Immigration)* (1999), File no.: 25374 (S.C.C.) at 13.

Thus, it is suggested here that the perspective of the minority, regarding the complainant's equality rights as balanced against the accused's rights to full answer and defence, should be given additional weight in the interpretation of the current or any future legislation in the area.

L'Heureux-Dubé J. also reflects on past evidentiary rules such as those addressed in section 276 of the Criminal Code. It is her position that to allow an unwarranted fishing expedition into a complainant's past sexual histories as recorded in her therapeutic records may allow an accused person to circumvent the protections created in the rape shield legislation.⁴²

Moreover, she highlights another antiquated legal notion to support her position, specifically the requirement for corroboration before a woman's or a child's allegations of sexual assault could be brought before the courts. She challenges that such a provision could no longer withstand *Charter* scrutiny. This notion is connected to a sexual assault complainant's therapeutic record, as she wrote:

In my view, a legal system which devalues the evidence of complainants to sexual assault by *de facto presuming* their uncreditworthiness would raise similar concerns. It would not reflect, far less promote "a society in which all are secure in the knowledge that they are recognized at law as human beings a equally deserving of concern, respect and consideration."⁴³

⁴²*R. v. O'Connor*, *supra* note 1 at 66.

⁴³ *Ibid.* at 58; *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 at 15 per McIntyre J.

From this point she extends her rationale to examine stereotypical reasoning or conclusions based on speculations that would affect equality principles in the threshold requirement of providing a court with a relevance evidentiary foundation. To automatically expose a complainant's personal backgrounds, such as those contained within therapeutic records, has the potential to reflect a systemic bias in the criminal justice system against victimized women. On the routine request for disclosure without establishing a threshold of relevance L'Heureux-Dubé J. wrote:

Such requests, in essence, rest on the assumption that the personal and psychological backgrounds and profiles of complainants of sexual assault are relevant as to whether or not the complainant consented to the sexual contact, or whether the accused honestly believed that she consented. Although the defence must be free to *demonstrate*, without resorting to stereotypical reasoning, that such is relevant to a live issue at trial, it would mark the triumph of stereotype over logic if courts and lawyers were simply to *assume* such relevance to exist, without requiring any evidence to this effect whatsoever.⁴⁴ [emphasis hers]

Finally, L'Heureux-Dubé J. discussed the potential application of the law as it related to the victim of a sexual assault and the community rights to have these matters determined by a court. The impact on the woman who must choose between "accusing their attacker and maintaining the confidentiality of their records" was acknowledged. To make this point she relied on the words of Hill J. in *R. v. Barbosa*:

In addressing the disclosure of records, relating to past treatment, analysis, assessment or care of a complainant, it is necessary to remember that the pursuit of full answer and defence on behalf of an accused person should be achieved without indiscriminately or arbitrarily eradicating the privacy of the complainant. Systemic revictimization of a complainant fosters

⁴⁴*Ibid.* at 58.

disrepute for the criminal justice system"⁴⁵ [emphasis hers].

(C) Bill C- 46

The common law position developed by the majority in *O'Connor* was superceded by legislation. One critical feature of this legislation is the way in which it was drafted. The legislators, drafting Bill C-46, adopted the reasoning from both the majority and the minority from the *O'Connor* decision, including the views of L'Heureux-Dubé J.'s, that considered the rights of a sexual assault complainant, despite the fact that some of those views were specifically rejected by the majority.

The relevant sections of this legislation need to be reviewed at this stage. This examination is important to the advancement of my analysis of this subject in four ways. First, it provides the reader with some insight into one method of Canadian law making. It examines the consultation process and a number of the considerations reviewed by the legislators in the process. Secondly, it provides a comparison to the goals and objectives of a similar piece of legislation, commonly referred to as the rape shield laws. Through this comparison some of the principles behind the new disclosure provisions are legitimized and bolstered. Thirdly, it provides a template for the analysis of the process whereby the courts test the constitutionality of Bill C-46. Fourthly, as the courts scrutinize its constitutionality, the language used to interpret meaning, reveals a great deal about the

⁴⁵*Ibid.* at 59; *R. v. Barbosa* (1994), 92 C.C.C. (3d) 131 at 141 (Ont. Gen Div.).

rationale used by the courts to they balance the competing *Charter* guaranteed, but irreconcilable, rights.

On May 12, 1997, Bill C-46 was proclaimed. This was a legislative response to the issues surrounding defence applications for the disclosure and production of a sexual assault complainant's private records held by a third party. This legislation was enacted as sections 278.1 to 278.9 of the *Criminal Code*.⁴⁶ This legislation governs disclosure applications in cases relating to charges of sexual assault. Approximately one year prior to the proclamation, the Minister of Justice indicated the intended purpose of the new legislation was to "strengthen protection for complainants of sexual offences and to enhance privacy and equality rights for all complainants."⁴⁷

A review of each section of the legislative response is beyond the parameters of this thesis. Rather, this project will focus on the portions of the statute that endorse and expand upon those factors considered in the *O'Connor* decision.

As established in *O'Connor*, a two stage process is mandated. At the first stage, the trial judge must assess whether or not the records in issue should be reviewed by the court. The test at this threshold is "likely relevant."⁴⁸

⁴⁶*Criminal Code*, R.S., c. C-46. [hereinafter *Criminal Code*].

⁴⁷Department of Justice, News Release, June 12, 1996.

⁴⁸*Criminal Code*, s. 278.3(3).

To assist in the determination of likely relevance, section 278.3(4) codifies a number of assertions that are insufficient on their own to establish the requisite threshold:

- (a) that the record exists;
- (b) that the record relates to medical or psychiatric treatment or counselling that the complainant or witness has received or is receiving;
- (c) that the record relates to the incident that is the subject-matter of the proceeding;
- (d) that the record may disclose a prior inconsistent statement of the complainant or witness;
- (e) that the record may relate to the credibility of the complainant or witness;
- (f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
- (g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
- (h) that the record relates to the sexual activity of the complainant with any person, including the accused;
- (i) that the record relates to the presence or absence of a recent complainant;
- (j) that the record relates to the complainant's sexual reputation; or
- (k) that the record was made close in time to the complaint or to the activity that forms the subject-matter of the charge against the accused.⁴⁹

The first three subsections are consistent with the majority's view in *O'Connor*, with one exception. The Court maintained as a relevant consideration the issue of a temporal connection between the creation of the records and the date of the alleged commission of the offence. Also, in cases of "historical" accusations, a temporal connection between the creation of the records and the decision to bring charges against the accused was set out as a pertinent factor. It is important to note that this temporal connection is specifically

⁴⁹*Criminal Code*, s. 278.3 (4).

carved out as an insufficient ground in subsection (k) of the legislation.

In conjunction with issue of timing, subsection (i) deals with the issue of recent complaint. Prior to the enactment of this legislation, courts have traditionally maintained that the timing of the complaint is still a factor to consider in assessing the validity of the allegation.⁵⁰ Therefore, this new component of the legislation seems to overturn a historically relevant consideration. To my knowledge, this specific factor has not yet been challenged.

Section 278.3(4)(e), deals with the credibility of the complainant in general. It might be argued that this may be in conflict with the majority's assertion that the information contained in the complainant's records may be relevant if it "bears on the complainant's credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since."⁵¹

In subsection (f) reliability, as distinguished from credibility, is addressed. The potential for unreliability merely because the complainant is seeking treatment is specifically deemed inappropriate.

Subsection (g) incorporates the anti-myth reasoning set out in *R. v. Seaboyer*⁵² and eventually codified in section 276 of the *Criminal Code*. This issue will be elaborated on in

⁵⁰*R. v. Henrich* (1996), 108 C.C.C. (3d) 97 (Ont. C.A.).

⁵¹*R. v. O'Connor*, *supra* note 16 at 23.

⁵²*R. v. Seaboyer*, *supra* note 15.

the analysis section of this chapter. Still, it should be noted that this section marks that a complainant's sexual history is an irrelevant consideration. Similarly, in subsection (h) and (j), which do not include the word "may" could be interpreted to absolutely prohibit the pretrial discovery of information concerning sexual activity or reputation. These sections appear to support section 277 of the *Criminal Code*. Section 277 deals with the issue of reputation evidence, specifically making such evidence inadmissible for the purpose of challenging or supporting the credibility of a sexual assault complainant.

Furthermore, a trial judge must also consider the provisions of section 278.5(1) and (2) prior to ordering the person in possession or control of the record to produce it to the court for review. Section 278.5(1) requires a trial judge to reconsider subsections 278.3(2) to (6), that set out the accused's onus to establish the threshold requirement of likely relevant and finally to establish that "the production of the record is necessary in the interests of justice." Arguably, this last provision adds an additional flexibility for a trial judge attempting to balance the competing interests of the parties.

Section 278.5(2) also sets out specific factors that the trial judge must take into account in determining whether or not the records should be produced for the purposes of judicial review. These factors to be considered are in addition to "the salutary and deleterious effects of the determination on the accused's right to make full answer in defence and on the right to privacy and equality of the complainant." It is important to compare the words used in this section with those used by Lamer C.J.C., and Sopinka J. in *O'Connor*, specifically:

We also agree that in making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer in defence.⁵³

They do not endorse a right to privacy and equality on behalf of the complainant.

Also of significance are the factors set out in section 278.5(2)(a) through (h).⁵⁴ It is important to note that added to the majority's list of relevant factors, the section also incorporates L'Heureux-Dubé J.'s two additional factors that appear in subsections (f), (g) and (h).⁵⁵ It is this specific inclusion of the dissent's additional factors that have caused some members of the defence bar to challenge the constitutionality of Bill C-46, most notably in *R. v. Mills*.⁵⁶

⁵³*R. v. O'Connor*, *supra* note 16.

⁵⁴ In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), ... the judge shall take the following factors into account:

- the extent to which the record is necessary for the accused to make a full answer and defence;
- the prohibitive value of the record;
- the nature and extent of the reasonable expectation of privacy with respect to the record;
- whether production of the record is based on a discriminatory belief or bias;
- the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- society's interest in encouraging the reporting of sexual offences;
- society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- the effect of the determination on the integrity of the trial process.

⁵⁵*R. v. O'Connor*, *supra* note 16 at 23 and 69.

⁵⁶*R. v. Mills* (1997) 205 A.R. 321; 207 A.R. 161 (Q.B.), on appeal to S.C.C.

Once all of these factors have been considered at the first stage and the trial judge is persuaded, he or she should review the records in issue, then sections 278.6 (1) to (3) apply. Effectively the review is done in the absence of the parties. During this review, the trial judge is guided by section 278.7. The wording in this section parallels that of section 278.5 already reviewed. Section 278.7 specifically demands the same factors considered at stage one be reconsidered again at this stage of the process. At this stage, the judge must be satisfied that the record, or part thereof, is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interest of justice. The factors that are to be considered in such a balancing process are set out specifically in section 278.7(2), as the trial judge embarks upon the mission of balancing the competing interest of the accused's right to make full answer in defence and the right of privacy and equality of the complainant. As stated earlier, those considerations are set out in section 278.5(2)(a) to (h).⁵⁷

Once satisfied that the record, or any part thereof, is likely relevant to either an issue at trial or the competence of a witness to testify, and its production is necessary in the interest of justice, the trial judge may impose certain conditions on its production. Again, this statute requires that the interests of justice be protected as well as "to the greatest extent possible, the privacy and equality interests of the complainant."⁵⁸ As such, the records may be edited, restricted from either duplication or publication, or from being

⁵⁷ *Criminal Code*, sections 278.7(1) and (2).

⁵⁸ *Ibid.* at section 278.7(3).

disclosed to any other third party.⁵⁹

(D) Analysis

1. Origins and Policy

Prior to the drafting of Bill C-46, Parliament was aware of a growing dissatisfaction with the criminal justice system's treatment and response to women and children. The 1992 legislators drafted amendments to the *Criminal Code* to redress credibility issues, stereotypes and myths often connected to female and children witnesses testifying in matters charging sexual offences. Bill C-49, codified as sections 276 and 277, withstood constitutional challenge in *R. v. Seaboyer*.⁶⁰ McLachlin, J., speaking for the majority, addressed the problems which courts have traditionally been confronted with relating to issues of relevance in charges of sexual assaults. Specifically, the Court stated:

The main purpose of the legislation is to abolish the old common-law rules which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common-law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and other was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin

⁵⁹See S. Chapman, "Third Party Records" [unreported] a paper presented at the National Criminal Law Program, University of Victoria, Victoria, B.C., July 1998, for an excellent review of Bill C-46.

⁶⁰*R. v. Seaboyer*, *supra* note 15.

myths are now discredited.⁶¹

Also in the *Seaboyer* decision, L'Heureux-Dubé, dissenting in part, discussed the concept of relevance in the context of sexual assault charges and traditional misconceptions surrounding relevance. Specifically, on the test of relevance, she stated:

Whatever the test, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part, there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth. As I have made clear, this area of the law has been particularly prone to the utilization of stereotype and determinations of relevance and again, as was demonstrated earlier, this appears to be the unfortunate concomitant of a society which, to a large measure, holds these beliefs. It would also appear that the recognition of the large role that stereotype may play in such determinations has had surprisingly little impact in this area of the law.⁶²

Further, L'Heureux-Dubé, J., again questioning the basis of the doctrine of recent complaint and the historical rules relating to the corroboration in sexual assault trials, commented that:

Application of the relevance concept was not the only way in which the common-law integrated stereotype and myth into trials of sexual offences. Also part of the unique body of evidentiary law surrounding sexual offences were, among other things, the doctrine of recent complaint and corroboration rules. These evidentiary concepts were also based upon stereotypes of the female complainant requiring independent evidence to

⁶¹*Ibid.* at 386.

⁶²*Ibid.* at 356.

support her evidence and, in addition, evidence that she raised a “hue and cry” after her assault. It is noteworthy that both recent complaint and corroboration rules formed exceptions to general rules of evidence.⁶³

Thus, in these three passages, the judicial branch of the state (in a dissenting judgement) recognizes an inequality issue, encapsulated in many stereotypes. The Court upheld the legislative branch of the state’s legal scheme to address a component of the problem.⁶⁴

The Court recognized inappropriate, sexist and discriminatory beliefs that had no place in the assessment of a female witness’s credibility and upheld the legislative scheme that addressed the issue. However, the case law interpreting sections 276 and 277 of the *Criminal Code* failed to address the issue of access by accused parties to the therapeutic records of complainants in sexual offence prosecutions. That specific issue was brought to the attention of the Minister of Justice in June of 1994, during the annual consultation of violence against women symposium.⁶⁵

In November of 1995, an Issues and Options Paper was distributed by the Executive Branch, highlighting addressing this void in the legislation. Between January 1995 and February 1996, an extensive series of consultations were conducted across Canada.

⁶³*Ibid.* at 347.

⁶⁴See S. Bond, “Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance” (1983) 16 Dalhousie L.J. 416, for a review of sexist myths and their impact within the criminal justice system.

⁶⁵*L.C. and Brian Mills and The Attorney General of Alberta and The Attorney General of Canada*, Affidavit of Catherine Kane, Supreme Court of Canada, File Number 26358, at page 2, paragraph 4.

Representatives from the Federal Department of Justice met with “Provincial Attorneys General, representatives from the Defence Bar, representatives of the Canadian Bar Association, academics, sexual assault victim service providers, women’s groups and others to solicit their views on criminal law reform initiatives in this area.” ⁶⁶

After the *O'Connor* decision was rendered, the Department of Justice conducted further consultations with members of the Defence Bar, feminist academics, Crowns and service providers for sexual assault complainants. This consultation process helped to establish a range of viewpoints surrounding the disclosure of a complainant’s therapeutic records. At one end of the continuum were those that advocated an absolute privilege for all counseling and related records. This position was rejected, but a goal was established. Specifically, Catherine Kane, an employee of the Federal Department of Justice, Criminal Law Policy Section, states in her affidavit filed in the Supreme Court that:

There was a consensus that the right of an accused person to make full answer in defence required the production of relevant information. Participants in the consultation process emphasized that legislation should include the following essential elements: clarify that a wide range of personal records commonly sought by defence counsel would be subject to the codified procedure; clarify that applications for production of records should be brought at trial, not at the preliminary inquiry; clarify that the accused must establish, with reference to specific grounds, that the records sought would be likely relevant to an issue at trial or to the competence of a witness to testify; to require the judge to consider the Charter rights of *both* the accused and complainant or witness before or in production to the judge and/or to the accused; to clarify that a subpoena issued to require a record holder to bring records to the court would not circumvent the production regime and result in the recipient of the subpoena providing the records directly to the counsel for the accused and to clarify that record holders (particularly service providers), should not be punished in costs for

⁶⁶*Ibid.* at page 2, paragraph 5.

asserting their rights and their clients rights to privacy in the records sought and for insisting that the accused establish the relevance of the particular records. [emphasis hers]⁶⁷

Due to this consultation process, legislative options were revised to create Bill C-46. This Bill was introduced by the Minister of Justice and received first reading in the House of Commons on June 12, 1996. Next, this Bill was examined by the Standing Committee on Justice and Legal Affairs. This process included hearings wherein over 20 witnesses appeared and represented a broad range of interests, including women's groups, academics, the Canadian Mental Health Association, and representatives from both the defence bar and the Crown. Bill C-46 received royal assent on April 25, 1997 and was proclaimed in force and effect on May 12, 1997. ⁶⁸

Further insight into the intent of the legislation can be garnered from news releases associated with the new legislation. On June 12, 1996, the Department of Justice issued a news release, indicating the aim of the new legislation was to "strengthen protection for complainants of sexual offences" and to "enhance privacy and equality rights for all complainants." The amendments were "intended to correct a problem that has arisen almost exclusively in sexual assault cases, which is the unwarranted invasion of a

⁶⁷*Ibid.* at page 3, paragraph 8. Note that written briefs were also submitted to the Standing Committee on Justice and Legal Affairs by the National Association of Women and the Law, the Women's Legal Education and Action Fund, Canadian Mental Health Association (Legal Issues Task Force), the National Council of Women of Canada, Ontario Coalition of Rape Crisis Centres, Action ontarienne centre la violence faite aux femmes, CALACS, METRAC and Canadian Council of Criminal Defence Lawyers.

⁶⁸*Ibid.* at page 4, paragraph 9.

complainant's private and confidential records for improper purposes."⁶⁹

As well, the intent of the legislation is clearly set out in its pre-amble. It addresses concerns about sexual violence and abuse in our community. It also outlines the detrimental affects of compelling production of intensely personal information, particularly information associated with counseling and therapeutic records. The wording of the legislation is strikingly similar to the pre-amble portion of Bill C-49,⁷⁰ now commonly referred to as the rape shield provisions as set out in section 276 of the *Criminal Code*.⁷¹ As reviewed earlier, the rape shield provisions prohibit the courts from relying on myths and stereotypes that have historically pervaded the trial processes determination of sexual assault complainant's credibility. They have attempted to restore some level of dignity to a fair trial process.

Beyond the pre-amble, it is argued that the new legislation continues to advance some of the same themes as established by the rape shield provisions. In *Seaboyer*, the Court debunked certain myths and stereotypes improperly, and all too often, associated with a sexual assault complainant. For example, section 276 prohibits the use of:

Evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, ... to support an inference that, by reason of this sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter

⁶⁹Department of Justice News Release, June 12, 1996.

⁷⁰*An Act to Amend the Criminal Code (sexual assault)*, S.C. 1982, c. 38.

⁷¹H. Holmes, "An Analysis of Bill C-46, Production of Records in Sexual Offence Proceedings" (1997) 2 Can. Crim. L.R. 71 at 75.

of the charge; or (b) is less worthy of belief.

In addition to these general statements of law, the legislators also codified a number of considerations that are to be applied by a trial judge to assess the admissibility of a complainant's sexual history. These factors are comparable to those set out in section 278.2. Section 276.(3) established the following factors:

- (a) the interests of justice, including the right of the accused to make full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right or privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, Provincial Court judge or justice considers relevant.⁷²

Thus, when one reviews the minority's judgment from *O'Connor*, and the legislators' intent in the codification of sections 278.1 to 278.91, we observe a common goal that encourages women who have been victimized by sexual assault to report those offences to the police and have them dealt with in the criminal justice system. Similarly, in section 276.(3), we observe a specific recognition of the possibility for discriminatory beliefs or biases and an acceptance that those issues should be excluded from the fact finding

⁷²*Criminal Code*, *supra* note 3. See also J. McInnes and C. Boyle "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 U.B.C.L.J. Vol. 2 341, for an excellent analysis of Bill C-49.

process. Lastly, subsections (f) and (g) underscore the importance of supporting the dignity and right to privacy as well as the personal security of the complainant in cases involving sexual offences.

Returning our attention to Bill C-46, when one looks closely at the prohibited inferences set out in section 278.3(4), a similar principle is recognized, that the existence of certain facts do not, in logic or in law, allow for certain inferences to be drawn. E.G. Ewaschuk described inferences as “factual conclusions drawn as a result of a process of logical reasoning”.⁷³ He went on to explain, in some detail, the method by which inferences may be drawn:

Thus, a trier of fact is entitled to draw inferences from evidence tendered at trial. The factual inferences are, generally, drawn from ‘primary findings of fact’ made by the trier of fact in respect of individual items of evidence. However, the inferences drawn must be safe inferences in the sense that they reasonably and logically follow from an item or items of evidence accepted as validly proven only after the trier of fact has weighed all of the evidence as a whole. [emphasis his]⁷⁴

Relating this analysis to this disclosure issue for example, the fact that a therapeutic record relates to treatment received by a complainant - even if the treatment is directly connected to the specific allegations of the proceeding - by itself does not allow inferences to be made about issues of likely relevance. The fact that the complainant sought treatment after being sexually assaulted by an accused person, and that a record of that treatment

⁷³E. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd ed. (Aurora, Ont.: Canada Law Book Inc., 1994) at 16-57.

⁷⁴*Ibid.* at 16-57. See also Doherty, J.A.’s comments in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 209 (Ont. C.A.).

exists, is a neutral fact from which no inferences can be drawn.⁷⁵

However, this position was not adopted by the majority in *O'Connor*. It is suggested here that the Court could have determined that without a strong evidentiary foundation to establish relevance, no inference could be drawn from the temporal connection between the creation of the records and the date of the alleged commission offence. It is argued that no connection can flow logically and reasonably from this fact and as such it should be condemned as conjecture and speculation.⁷⁶

The Supreme Court declined to protect the rights of the complainants and to create an environment that does not deter women from invoking the criminal justice system. They failed to recognize not only the general significance of the nature of therapeutic records, but also the specific function that a therapist or counsellor has when treating someone that has been sexually assaulted. For example, in addition to being extremely personal, the materials are focused on exploring the complainant's emotional and psychological responses to a traumatic event, particularly being sexually violated. This lies in significant contrast to investigators' evidence and witness testimony that is relied on to ascertain

⁷⁵See Chipman J.A. in *R. v. White* (1994), 89 C.C.C. (3d) 336 (N.S.C.A.) at 351.

⁷⁶H. Holmes, *supra* note 71 at 89. Arguably the prohibition would not apply to a listed factor coupled with some other fact, which together give rise to a legitimate inference bearing on an issue at trial. While the simple existence of a sexual assault counseling record is completely uninformative in and of itself, it might legitimately bear on the issues in the trial if, for example, the complainant denied ever having used sexual assault counselling services.

historical facts.⁷⁷ Perhaps an analogy will help make this point.

Unfortunately, most of us know someone whose home or apartment has been broken into. If we do not, we can all certainly empathize with the victim of such a crime. They feel violated. The sanctity of their home has been breached and they feel angry, afraid and most of all, very uneasy about staying in a place where they no longer feel safe. This is all aggravated by the fact that one's home is often considered a place to escape from the rest of the world. For most, regardless of how bad things might get in the outside world, a home is a place to retreat to that will afford one the opportunity to relax and find some peace of mind. Once your home has been broken into you no longer have a sanctuary to retreat to, rather you now need a place that you can go to because you feel vulnerable. People understand this because it is a common human need to feel safe in one's home. Through no fault of our own, anyone of us could be next. It is because of this that we all seem to have compassion for the needs of these types of victims. The desire to move or guard against future invasions is recognized, as is the need for therapeutic counselling, in some cases. In this example, it is hard to imagine what court would allow an accused person charged with such an offence to obtain the therapeutic records of the home owner, without a sound evidentiary basis, to determine whether the alleged victim, during their discussions with their counsellor, possibly made any inconsistent statements about the day their home was broken into, or their recollections as to how they found the contents of their bedroom. Such a notion would be seen as positively outrageous. Of course counsel

⁷⁷*R. v. O'Connor*, *supra* note 1 at 65.

for an accused could always make an application for additional disclosure if the appropriate circumstances were in place to support a claim of relevance. For example, if counsel had obtained some information based on evidence that a complainant had in the past “staged” or falsified claims of being victimized in such a fashion, then the counselling records of such a complainant may certainly be a live issue. Still the point is made that such a claim of relevance would require an evidentiary foundation, and the courts, it is suggested, would not be inclined to allow counsel to embark on a “fishing expedition” to discover potentially relevant details.

Our society has evolved to the point that we accept the place of counsellors in assisting those that have been exposed to terribly traumatic events. For example, the state made available to jurors who sat on the Paul Bernardo Case crisis therapists. As triers of fact to these tragic and inhuman violent violations that they were required to observe, the criminal justice system not only recognized the need for such care, but also paid for it. Most Canadians would agree that this is a small price to pay for what society got in return from these citizens. In this light, could anyone imagine defence counsel arguing for the right to open such therapeutic records to ensure a juror’s competence? The notion evokes indignation.

Outside of the criminal justice system another example is the counselling care that was offered to those Nova Scotians, who risked their own lives to attempt to rescue any potential survivors of the downed Swiss Air flight, off shore from Peggy’s Cove in the fall of 1998. And beyond just the civilian needs, the government also recognized that the

military personal, deployed to assist in the recovery process and having witnessed the grisly remains of the doomed passengers, similar needs for professional counselling. What court would allow the opening of such records to assess the credibility of such witnesses, if called to testify about their observations during the course of a civil trial? Certainly such a motion from the discovering party would have an onerous burden to establish relevance.

Why then is that we have a difficult time understanding the need for a sexual assault survivor to seek treatment for being attacked? The violation that they have suffered is far worse than that of the homeowner. Where does the victim of a sexual assault go to feel safe again? It is not their home that has been violated but their body, the very self that no longer protects them from the world at large. It is not a property violation, rather it is a violent interpersonal infringement. It is argued that the majority view in *O'Connor Case* failed to understand this reality in their interpretation of the rights of the accused to make full answer and defence and the rights of the complainant to equality before the court and to their privacy. The majority failed to apply a more contextual approach,⁷⁸ as did L'Heureux-Dubé J. in her questioning of the relevance of the records, to the issue of the accused's right to full answer and defence. Reviewing her own rationale in *R. v. Osolin*,⁷⁹ she articulated the special characteristics of therapeutic records and highlighted the potential they have to "derail" the fact finding mission of the trial process. Specifically, she

⁷⁸C. Boyle, "A Feminist Approach to Criminal Defences" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications Ltd., 1991), advances the theory of contextualizing uniquely female experiences.

⁷⁹*R. v. Osolin*, *supra* note 14.

attempted to contextualize the nature of the records, stating that:

...medical records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial. Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial a witness is sworn to testify as to the particular events in issue. By contrast, in therapy an entire spectrum of factors such as personal history, thought, emotions as well as particular acts may inform the dialogue between the therapist and patient. Thus, there is a serious risk that such statements could be taken piecemeal out of context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.⁸⁰

Yet, why do we as a society not feel the same level of empathy towards someone whose body - and self - has been invaded and whose need for healing is premised on such an intimate a level? It is my opinion that it is stereotypical misconceptions and uninformed positions that causes our criminal justice system to turn a blind eye to the harm being suffered by such groundless privacy invasions connected to demands for the production of their therapeutic records. Support for this position can found in the contrasting opinions of the Supreme Court's findings in *R. v. O'Connor*⁸¹ on the issue of the threshold of likely relevance at the first stage of the inquiry. For example, the majority of the Court sets the threshold as "not an onerous one" and continues to link a close temporal connection

⁸⁰*Ibid.* at 499. H. Holmes, in "Access to Third Party Records" (1996) 44 C.R. (4th) 144 at 148 examines the nature of counselling records. It is her concern that there exists an immense potential for abuse of the material contained therein and therefore argues for an application of "scrupulous care to ensure actual relevance to real issues."

⁸¹*R. v. O'Connor*, *supra* note 1. See also A. Young in "When Titans Clash: the Limits of Constitutional Adjudication" (1996), C.R. (4th) 152, that examines the historical re-victimization by an insensitive and patriarchal criminal justice system.

between the creation of the records and the date of the allegations as a relevant consideration. This represents a jump in logic premised on a stereotypical myth about women who delay reporting an incident and should therefore be more carefully scrutinized. Rather, it is suggested here that the length of time that it takes for a person to come forward with a complaint, without anything more, is indistinguishable from the characteristic of the course of treatment selected to commence the healing process.⁸²

A secondary effect that may flow from such considerations is society's lost opportunity to deter males from continuing such behaviour. If one assumes that women will be less willing to come before the courts to have these matters judicially determined if they believe their personal records will be opened and reviewed by the court (or worse the accused) without some evidentiary foundation to assess the threshold of relevance, then society will have lost an opportunity to address and denounce the behaviour as criminal. One might also argue that those that would attack a female do so because they believe they can over power the victim and because they can get away with it. Assuming, for a moment, that individuals modify their behaviour to avoid negative consequences (such as imprisonment or other court sanctions), certainly similarly minded individuals would recognize the failure of the same court process to protect the rights of the complainant. As a result of this lack of disincentive, they may be more willing to manipulate the position of power imbalance that women occupy in our society's criminal justice system and continue to conduct themselves in a manner that continues to objectify women and put their lives

⁸²See *R. v. O'Connor*, *supra* note 1 at 65 for a discussion regarding the irrelevancy of treatment type.

and safety in peril.

Actions taken by the courts that factor in these myths and stereotypes when determining issues of access to third party records creates not only a grave injustice for the survivor of a sexual attack, but also for society as a whole. When the community loses faith in the system's ability to serve both the victim as well as those accused of crimes, respect for the system is lost and people either stop looking for justice all together or, at a minimum, look elsewhere for it. One clear example of this is the case of *R. v. Lee*,⁸³ where the trial judge considered the issue of the validity of sections 278.1 to 278.9, and declared the provisions unconstitutional. The Court then decided that the records of the complainant should be disclosed to the defence. As a result, the Crown, in consultation with the complainant, stayed the criminal charges. It is suggested that this is a concrete example of how a ruling of a court on the issue of opening up a survivor's therapeutic records can impact the process, including the community's right to access justice. As well, the impact can have a ripple effect on other charges. As additional victims are advised of such rulings, they will be forced to make difficult decisions about immersing themselves in a trial system that fails to recognize a balancing of their equal rights and privacy concerns. Their individual health concerns and treatment progress will be factored into one's decision making process as to whether or not they will come forward with their complaint. One can only speculate, at this stage as to the chilling effect that such rulings will have on our community's efforts to reduce the further violent victimization of women in our society.

⁸³*R. v. Lee* (1997), 35 O.R. (3d) 598 (Ont. G.D.) and the Affidavit of Catherine Kane, *supra* note 65.

Also, when compared to the Supreme Court's comments in *Smith v. Jones*⁸⁴ a further inequality is revealed. In this case the main issue deliberated and commented on was solicitor-client privilege. The facts in this case involved a male accused charged with aggravated sexual assault on a prostitute. His lawyer referred him to a psychiatrist believing that it would be of assistance in the preparation of a defence or in supporting a sentencing position. The lawyer advised the accused that the consultation was privileged. During the consultation the accused told the psychiatrist, in great detail, his plan to kidnap, rape and kill prostitutes. The psychiatrist informed the lawyer that he was of the opinion that the accused was dangerous and that he would, more likely than not, carry out this plan without treatment. The accused pled guilty and when the psychiatrist discovered that his opinion would not be addressed in the sentencing hearing he commenced an action for a declaration that he was entitled to disclose this information in the interests of public safety. The British Columbia Court of Appeal allowed the psychiatrist to disclose the information to the Crown and the police. The Supreme Court of Canada affirmed the decision of the lower court and carefully assessed the three factors that should be taken into account in determining whether public safety outweighs solicitor-client privilege: a clear risk to an identifiable person or group of persons; a risk of serious bodily harm or death; and imminence of danger.⁸⁵

⁸⁴[1999] S.C.J. No. 15 File No.:26500.

⁸⁵With the following directive; that the file was to be unsealed and the publication ban was lifted, except for those parts of the psychiatrist's report which did not fall within the public safety exception.

What is relevant here, was the dissenting judgement of Major J.⁸⁶ A component of his rationale was based on fostering a “climate in which dangerous individuals are more likely to disclose their disorders, seek treatment and pose less danger to the public.”⁸⁷ It was his view that that to create such a climate it was necessary to confirm the communications as privileged, but permit the psychiatrist to give his opinion and diagnosis regarding the threat posed by the accused. Particularly interesting was his perspective on the chilling effect that opening the privileged relationship between patient and the counsellor would have on the public. He stated:

If defence counsel cannot freely refer clients, particularly dangerous ones, to medical or other experts without running the serious risk of the privilege being set aside, their response will be not to refer clients until after the trial, if at all. This could result in dangerous people remaining free on bail for long periods of time , undiagnosed and untreated, presenting a danger to society. The chilling effect of completely breaching the privilege would have the undesired effect of discouraging those individuals in need of treatment for serious and dangerous conditions from consulting professional help. In this case the interests of the appellant and more importantly the interests of society would be better served by obtaining treatment. This Court has recognized that mental health including those suffering from potentially dangerous illnesses, is an important public good.⁸⁸

This issue of promoting treatment and counselling is not addressed by the majority.

Therefore, while it would appear that the Court’s majority position in *O’Connor*,⁸⁹ specifically that the societal interest in encouraging the reporting of sexual assault offences

⁸⁶Dissenting judgement included Lamer C.J., Major and Binnie JJ.

⁸⁷*Smith v. Jones*, *supra* note 84 at 4.

⁸⁸*Ibid.* at 7. Reference at the end of this passage is made to *M.(A.) v. Ryan*, that is discussed later in this chapter.

⁸⁹*Supra* note 1 at 24.

and the obtaining of treatment by victims was declared not to be a “paramount consideration” in the determination of the disclosure of complainants’ counselling records, the potential harm that flows from discouraging treatment for dangerous offenders is a priority for the minority of the Court when it comes to the issue of solicitor-client privilege. Perhaps the distinction between the two is that, as highlighted in Chapter One, the vast majority of sexual offenders are male and sexual assault complainants are female. If this is in fact the premise behind the distinction, then the gender-based inequality underlying the positions is startling.

2. Constitutional Challenges and the *Mills* Case.

To review thus far, this chapter has examined a fact driven issue being resolved through the courts. In the absence of statutory principles, the courts created a remedy, a two stage process to determine the production of therapeutic records in a third party’s possession. The legislative branch of government responded to the need for further assistance by passing Bill C-46. This codification was created through a public consultation process, and input from Canadian legal scholars, including those Justices sitting on the Supreme Court of Canada. Yet this is not the end of our review. The next stage in the formation of a law in Canadian society is how the courts have interpreted Bill C-46. As one would have expected, there have been constitutional challenges to sections 278.1 to 278.91. While these constitutional challenges are interesting enough on their own, they also advance the examination of gender inequality within the criminal justice system. To focus

on this issue other matters such as procedural requirements, distinctions between the credibility and the reliability of complainants in sexual assault prosecutions and rulings on the review and production of therapeutic records are not discussed here.⁹⁰

Further support for the argument that gender plays a large part in the creation of a law can be inferred from the language used by the courts as they assess the constitutionality of Bill C-46. In particular, it is noted that although one Court cites principles that prohibit the ranking of Charter rights, the end result of the balancing process implemented favours the accused's right to full answer and defence over the female complainant's right to privacy. It is also important to note in these cases the degree to which the trial judges attempt to determine the constitutionality of Bill C-46 within a framework of contextualization. This is particularly significant in the consideration of the section 1 *Charter* limitations.

For example in *R. v. Mills*,⁹¹ Belzil J. found Bill C-46 as unconstitutional. In this case, the accused was charged with a sexual assault offence and sought disclosure of the complainant's therapeutic records, not in possession of the Crown. During the course of the trial, the defence commenced a series of motions for the disclosure of the complainant's therapeutic records. Belzil J. originally applied the principles as set out by the majority in *O'Connor*, as the motions pre-dated the legislation. Having been persuaded on their likely relevance, Belzil J. reviewed the records and ordered two full

⁹⁰For interpretations on procedural issues see: *R. v. C.V.G.*, [1997] S.J. No. 856 (Sask. Q.B.); *R. v. J.F.G.*, [1997] N.W.T.J. No. 47 (S.C.).

⁹¹*R. v. Mills*, *supra* note 2.

and two part pages disclosed to the accused. A second motion, requesting additional records was heard but prior to a ruling Bill C-46 was ruled in force and effect. Counsel for the accused advocated that Bill C-46 violated the accused's section 7 and 11 (d) *Charter* rights. The violation was articulated through an impairment of his ability to make full answer in defence and an undermining of his constitutional right to a fair trial. Equality rights as guaranteed by section 15 of the *Charter* were not considered by the Court.

Belzil J. accepted the majority's view in the Supreme Court of Canada in *O'Connor* as the state of the law. At page 336, he stated:

It is important to note that the majority judgment pointed out that in criminal proceedings, the ultimate goal is the search for truth rather than the suppression of potentially relevant evidence.⁹²

The Alberta Court also highlighted the majority's rejection of the concept of a societal interest in the prosecution of sexual assault offences.⁹³ It was determined that those factors considered as relevant by L'Heureux-Dubé J. and specifically rejected by the majority, yet included in the new legislation, were relevant issues to be assessed in determining the constitutional validity of the legislation. In addition, Belzil J. also noted that because Bill C-46 altered the balance between privacy rights and the rights of the accused to a fair trial, in part because the majority's ruling on the likely relevance test at the first stage, specifically endorsing a low threshold, was contrary to the higher threshold provided for in the new legislation. The Court held that this also created an unfair burden on the

⁹²*Ibid.* at 336.

⁹³*Ibid.* at 340.

accused.⁹⁴

Following this Belzil J. analyzed the inherent conflict between the two parties' rights by adopting Lamer C.J.C. findings in the *Dagenais Case*. Specifically Belzil J. noted:

It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s.11(d) over those protected by s.2(b). A hierarchal approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.⁹⁵

Belzil J. then goes on to conclude that “privacy rights do not trump the right to a fair trial and the right to fair trial does not trump privacy rights.”⁹⁶ Finally, Belzil J. brings his judgement to an end by holding Bill C-46 unconstitutional because within the legislation “privacy rights are ranked paramount to the rights of an accused to a fair trial.”⁹⁷

On a procedural ground, Belzil J. highlighted section 278.4(2) that specifies that neither the complainant nor the record holders are compellable as witnesses at a hearing for disclosure. This provision was held to constitute a substantial departure from the reasoning of the majority in *O'Connor*.⁹⁸

⁹⁴*Ibid.* at 344.

⁹⁵*Canadian Broadcasting Corp. v. Dagenais*, [1994] 3 S.C.R. 835; 94 C.C.C. (3d) 289; as cited in *R. v. Mills*, *supra* note 2.

⁹⁶*R. v. Mills*, *supra* note 2 at 344.

⁹⁷*Ibid.* at 344.

⁹⁸*Ibid.* at 341.

Moreover, on the ground of departing from the majority's position on the appropriate considerations the trial judge concluded:

In the net result, Bill C-46 forces a trial judge, without having seen the documents, to engage in such a balancing of interests at an early stage and compels the trial judge, in part, to use factors specifically rejected by a majority of the Supreme Court of Canada even at the second stage of the analysis.⁹⁹

It is clear, accordingly, that Bill C-46 does, indeed, incorporate a number of legal propositions advanced by the minority of the Supreme Court of Canada in *O'Connor* and specifically rejected by the majority.¹⁰⁰

It is suggested that an overwhelming concern of Belzil, J. was the potential for a miscarriage of justice for an accused if wrongly convicted. Part of his concern was connected with the nature of a sexual assault offence and the stigmatization that follows a conviction for same. He determined that the majority in the Supreme Court of Canada in *O'Connor* properly balanced all interests connected to the production of third party records and concluded that:

Bill C-46 tilts the balance and creates a legislative regime which is presumptive against disclosure even though the Supreme Court of Canada majority in *O'Connor* stated that such records are often relevant in criminal proceedings. In my view, the tilting which I have identified is confirmed by the legislative adoption of a number of legal propositions specifically rejected by a majority of the court.¹⁰¹

As such, the Court determined that the accused's *Charter* rights as guaranteed in sections

⁹⁹*Ibid.* at 342.

¹⁰⁰*Ibid.* at 343.

¹⁰¹*Ibid.* at 344.

7 and 11(d) had been breached by Bill C-46.

In a later decision, the same Court prepared its judgment on the issue of whether or not the new legislation could be saved by section 1 of the *Charter*.¹⁰² At the hearing of the determination of the issue, evidence was called by the Crown to elaborate on the specific and unique nature of a sexual assault complainant's relationship with a therapist. Referring to this evidence Belzil J. summarized the vulnerability and potential harm suffered by a sexual assault survivor. He held:

It is clear that the vast majority of complainants of sexual abuse are female. Therapists, for the most part, accept complainants of sexual abuse at face value, and absent information to the contrary, accept the complainant's version of alleged abuse as being accurate. The focus of individuals engaged in treating victims of sexual abuse is on rehabilitation and therapy, not on verifying the truth of allegations.¹⁰³

The Court attempted to come to grips with the potential chilling effect that the production of third party therapeutic records might have on other complainants of sexual assault, particularly related to their desire to seek counselling and treatment, to begin or advance the healing process. As such, the two competing interests needed to be balanced against the other. One had to give way to the other and, in the end, it was held that the impairment of a fundamental right, such as full answer in defence, could not be saved by section 1 of the *Charter*.¹⁰⁴ The ultimate effect of this determination is the creation of a hierarchy of Charter rights, with the accused's right to full answer and defence ranked

¹⁰²*R. v. Mills* (1997), 207 A.R. 161 (Q.B.).

¹⁰³*Ibid.* at 166.

¹⁰⁴*Ibid.* at 173.

above the conflicting rights of a complainant.

Also related to the issue of contextualizing the impact of the application of the legislation, Belzil J. continued to assess the impact on complainants' willingness to access justice through the criminal court. He recognized that the disclosure of therapeutic records "will act as a deterrent for a few complainants not to seek therapy" but he was satisfied that no more than a "small handful of patients have refused therapy due to a risk of disclosure in the course of legal proceedings."¹⁰⁵ This position was based on his examination of the evidence presented looking at the impact of the *O'Connor Case* over the two years following its determination. Rather, Belzil J. stressed the potential positive cathartic affect that a trial has for a "small number" of complainants that may also lead to either the commencement of therapy or the pursuit of further therapy.¹⁰⁶ However, the Court did not incorporate into its decision the effect that a not guilty verdict, based solely on credibility, might have on a complainant. As well, no assessment was made by the Court as to what impact the arbitrary determinations of likely relevant information, contained within a complainant's counselling records, may have on women deciding whether or not they will access justice through the criminal courts.

Rather, the Court, in conclusion, stated:

As important as privacy rights are, the fact is that the criminal justice system must remain vigilant to the danger of wrongful conviction.

¹⁰⁵*Ibid.* at 166.

¹⁰⁶*Ibid* at 116.

Parliament is not free to impair Charter protected rights. A balance must be struck between competing rights of privacy, on one hand, and the right to a fair trial, on the other.

In my view, Bill C-46 is not a proportional response and does not constitute a minimal impairment of rights, but rather constitutes a substantial impairment of the fundamental right to a fair trial.¹⁰⁷

In a similar application, Chapnik J. also held that sections 278.1 to 278.91 were unconstitutional.¹⁰⁸ In *R. v. Lee*, the accused was charged with two counts of sexual assault. During the course of his trial, Mr. Lee presented the Court with an argument that the new legislation violated his sections 7 and 11(d) *Charter* rights. The Court agreed and fully and unreservedly adopted the reasoning of Mr. Justice Belzil in *R. v. Mills*.¹⁰⁹ Later the Court assessed whether or not the legislation, now deemed unconstitutional, could be saved by section 1 of the *Charter*. Chapnik J. held that the new legislation could not be saved by section 1, and the Court ordered the production of third party records according to the procedure laid out by the Supreme Court of Canada in *O'Connor*. In determining the issue, the Court balanced the conflicting rights of the individuals involved in the process, and stated:

As I held yesterday, Parliament's attempt at balancing has resulted in a violation of the accused's right to a fair trial. There is not public interest in

¹⁰⁷*Ibid.* at 173.

¹⁰⁸*R. v. Lee* (1997), 35 O.R. 594 (Ont. G.D.).

¹⁰⁹*R. v. Mills*, *supra* note 2. See also *R. v. E.H.*, [1998] O.J. No. 4515 (Ont. G.D.), and *R. v. Hooper*, [1997] O.J. No. 5584 (Ont. G.D.), that adopt the reasons as set out in *R. v. Mills*.

impairing the rights of the accused person to have a fair trial.¹¹⁰

Furthermore, the Court relied on an article written by David Paciocco¹¹¹ that enumerated reasons why, in his view, Bill C-46 was unconstitutional. In his assessment of proportionality, he concluded:

In the end, though, this legislation is not even close to minimally impairing the relevant constitutional rights, the tests that this Bill adopts are so weighed down with extraneous factors and with redundant obstacles to access that it simply cannot be found to be minimally impairing. In fact, so prevalent are those obstacles, that this Bill will come perilously close to qualifying as one of those rare enactments whose very purpose, and not just its effect, contravenes the Charter.¹¹²

Thus, in these two cases we see the courts grappling with the competing interests of the accused's right to a full answer a defence and the complainants right to equality and privacy. Also, it is significant to note that the complainant's rights, while considered are not scrutinized within the parameters of the Charter. In the end, the female complainant's constitutional guarantees remained unrecognized and were forfeited to those claimed by the male accused.

On the other hand, a series of cases have upheld the constitutionality of the new legislation. In *R v. Stromner*, Patterson A.C.J. upheld the new legislation as constitutional

¹¹⁰*R. v. Lee* (1997), 35 O.R. (3d) 598 at 602 (Ont. G.D.).

¹¹¹Paciocco, D. "Bill C-46 should not survive constitutional challenge", 3 Sexual Offences Law Reporter 185 at 192. See also M. Peters "Third Party Disclosure Under O'Connor: Defence Concerns (1996) 44 C.R. (4th) 179.

¹¹²*Ibid.* as cited in *R. v. Lee*, supra note 110 at 602.

except for section 278.5(2),¹¹³ in an application by Mr. Stromner for access to the complainant's records in the possession of a third party. A component of the accused's application was that Bill C-46, was of no force and effect because it violated his rights as guaranteed under section 7 of the *Charter*. Once again, an argument promoting the declaration of the legislation as unconstitutional focused on the legislation's requirement that a trial judge was to consider factors that the majority in the Supreme Court of Canada rejected as appropriate considerations. These considerations related to society's interest in encouraging the reporting of sexual offences, society's interest in encouraging the obtaining of treatment by complainants of sexual offences and the effect of the determination on the integrity of the trial process.¹¹⁴ When he considered these values, they were contrasted with the accused's guaranteed rights to full answer in defence and the foundational premise of the criminal justice system - that no innocent person is wrongly convicted of an offence.

In balancing these competing interests, the trial judge determined that the means set out in the new legislation, to balance the competing interests, were rationally connected. He specifically held:

Society and the victims of sexual crimes equally have an interest in ensuring, to the extent possible, that the victims are not further humiliated and degraded by disclosure of essentially private material.

The impugned legislation is Parliament's direction for balancing these competing interests. In my view, with the exception of s. 278.5(2), the

¹¹³*R. v. Stromner*, [1997] A.J. No. 872 (Alta. P.C.).

¹¹⁴*R. v. Stromner*, [1997] A.J. No. 872 (Alta. P.C.).

measures contained in the Act are not arbitrary, unfair or based on irrational considerations. In balancing the interests of both parties, each of whom enjoys Constitutional protections, the means are rationally connected to the objective. Finally, there is a proportionality between the Charter limitations on the right of disclosure in the accused and the privacy rights of the individual.¹¹⁵

These words align themselves with the evolution of principles set out in the *Law Case*,¹¹⁶ that contemplated the scope and purpose of section 15 Charter guaranteed rights to equality.

As well, within a contextual framework the trial judge recognized the degrading aspects of a sexual assault complainant role in the criminal justice system. He noted that in addition to being compelled to testify to the degrading aspects of the crime, an additional further humiliation was being suffered as a result of the disclosure of her most intimate records to the very person who perpetrated this terrible indignity upon her.¹¹⁷

Nonetheless, with regards to section 278.5(2), the trial judge determined that the requirement of a judge to take into consideration factors, without having had an opportunity to review the records, created an “insurmountable barrier in the determination of the process.” It was his view that the inclusion of these factors during this stage of the disclosure determination process, had the potential of impacting on an accused’s right to

¹¹⁵*Ibid.* at 49 and 50.

¹¹⁶*Law v. Minister of Human Resources Development*, File No.: 25374, judgement March 25, 1999.

¹¹⁷*Ibid.* at 48.

make full answer and defence.¹¹⁸ As a result, this section was deemed unconstitutional.¹¹⁹

As well, there are a series of cases that have upheld the constitutionality of the new legislation in its entirety. In *R. v. Hurrie*, a defence motion was heard to strike down Bill-46.¹²⁰ During an application in a dangerous offender proceeding, one of the Crown witnesses revealed, for the first time, that she had spoken about the sexual offence to a counsellor in 1977. The Crown was not aware of this information until testified to by the witness. As a result of this testimonial disclosure, defence commenced a motion for the disclosure of the therapeutic records and challenged the constitutionality of provisions in sections 278.1 to 278.9 of the *Criminal Code*. The defence postulated that the legislation created a presumption against disclosure and that the procedural requirements set out in Bill C-46 infringed the accused's right to make full answer in defence. The defence argument proposed that the new legislation impaired the ability of defence counsel to properly prepare a defence because witnesses would be "chilled in their discussions with defence counsel."¹²¹ Additionally, the defence proposed that the procedural requirements were too onerous and that they included factors not present in the majority judgment in *O'Connor*.

The trial judge determined that the provisions in section 278.5(2) simply provided for the

¹¹⁸*Ibid.* at 46.

¹¹⁹*Ibid.* at 46.

¹²⁰*R. v. Hurrie*, [1997] B.C.J. No. 2634 (B.C.S.C.).

¹²¹*Ibid.* at 10.

need to establish an evidentiary basis of relevancy before asserting the initial production of the documents in questions, first to a judge and then potentially to an accused.

Taylor J. raised an interesting issue related to the accused's right to full answer in defence. Specifically, a concern was raised for potential complainants who wished to assert their rights to privacy and were aware that no such privacy right existed. The Court was concerned that such a complainant might refuse to provide even the Crown with this information. This would then circumvent the procedural process of the legislation that attempts to promote, at least in part, the accused's right to full answer in defence.¹²² Having reviewed the positions of both parties, Taylor J. formulated the specific issue, "whether in the recognition of the right to privacy in terms of records as defined in section 278.1, in the context of offences involving a complainant or witnesses' sexual integrity, as Parliament, in establishing procedures under section 278.1 to 278.9 by requiring the establishment of evidentiary basis, created an unacceptable risk of a possibility of miscarriage of justice occurring?"¹²³

The Court concluded that in an effort to balance the competing constitutional interests of the defence and the complainant, the intent of the legislation required an evidentiary basis of likely relevance, as opposed to an accused assertion of relevance as the threshold for invoking the two stages contemplated in the legislation. It was determined that the burden of establishing this evidentiary basis for production at either stage was not an onerous one.

¹²²*Ibid.* at 12.

¹²³*Ibid.* at 16.

The court concluded:

In my view, the procedures set up under Bill C-46 do not prevent an accused from the exercise of his right to full answer in defence in a way that could be said to infringe upon those rights. Rather, it establishes in an area of societal concern about the privacy rights of complainants and witnesses in the context of sexual conduct and the effects upon such persons of disclosure a low level evidentiary threshold of likely relevance across which an accused must pass to invade the privacy of such persons in pursuit of their constitutional rights. Recognizing that mere assertions are not adequate, Bill C-46 adopts this evidentiary threshold in the context of the criminal process and thus establishes, as I have remarked, a low threshold.¹²⁴

In *R. v. Curti*, the British Columbia Supreme Court addressed the issue of a section 1 *Charter* consideration.¹²⁵ Hutchison, J. dealt with an accused's motion regarding restrictions on his right to make full answer in defence as a result of Bill C-46's procedural requirements. The Court dismissed the application and went on to hold that any restrictions on the accused's right to make full answer in defence were justified in a free and democratic society because they merely required an accused to demonstrate likely relevance. This requirement balanced the accused's rights with the complainant's right to privacy. Hutchison, J., in coming to his conclusions, had the opportunity to review the case law set out above.¹²⁶ In addition to these trial level cases, the Court also reviewed Chief Justice Dickson's findings in *R. v. Oakes*, including:

Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity

¹²⁴*Ibid.* at 22.

¹²⁵*R. v. Curti*, [1997] B.C.J. No. 2367 (B.C.S.C.).

¹²⁶*R. v. Mills*, *supra* note 2; *R. v. Stromner*, *supra* note 113; *R. v. Lee*, *supra* note 108.

of the human person, commitment to society justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in society and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right for freedom must be shown, despite its effect, to be reasonable and demonstrably justified.¹²⁷

An effort was made by the trial judge to consider these guiding principles in its assessment of social history and values, in addition to the broad design and workings of society when it determined certain section 1 limitations.¹²⁸ Finally, the Court determined that with the establishment of a likely relevance threshold Parliament preserved full answer and defence while at the same time preventing accused individuals from engaging in fishing expeditions. In striking the appropriate balance, the Court concluded:

The cases hold that if Parliament has clearly shown its intention to take a certain course, and this course does not go beyond minimally infringing a Charter right, the courts should be loathe to overrule Parliament, which is, after all, surely supreme in a free and democratic society.¹²⁹

In a recent decision of the Nova Scotia Supreme Court, both the constitutionality of Bill C-46 as well as the role of the legislative branch of the government, was considered. In the case *R. v. Regan*, the accused applied to the Court for declaration that sections 278.1

¹²⁷*R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.) at 346; as cited in *R. v. Curti*, *supra* note 128 at 8.

¹²⁸*Jones v. The Queen* (1986), 31 D.L.R. (4th) 569 at 594 (S.C.C.); as cited in *R. v. Curti*, *supra* note 125 at 10.

¹²⁹*R. v. Curti*, *supra* at note 125, at 20. See also *R. v. Fanjoy*, [1997] O.J. No. 4828 (Ont. G.D.), endorsing *R. v. Curti*.

to 278.91 of the *Criminal Code*, were unconstitutional.”¹³⁰ In this case, the accused, charged with a number of sex related offences, argued that the new legislation created a more onerous regime than was considered appropriate by the Supreme Court of Canada in *O'Connor* and as a result, this legislation infringed his sections 7 and 11(d) rights as guaranteed under the *Charter*. The application was dismissed by MacDonald, A.C.J., who held that the legislation was not so significantly different from the process considered by the Supreme Court of Canada in *O'Connor*, so as to render it unconstitutional. Once again, the Court grappled with the competing interests of the accused and complainant. In doing so, the Court also considered the two branches of governments law making roles. Simply put, the Court acknowledged “Parliament is supreme, provided its laws are constitutionally valid. The Court’s role is to ensure constitutional compliance.”¹³¹

Both the Crown and interveners for the complainants argued that the process as formulated in *O'Connor* was not the only possible constitutionally valid approach to the production of private records. It was their view that as long as Bill C-46 addressed and balanced competing rights in a constitutionally acceptable way, then the legislation should be deemed constitutionally valid, even where the processes diverge from those proposed by the Supreme Court of Canada. Interestingly, they advocated that “to force Parliament to follow *O'Connor* on all fours, would be tantamount to the courts (as opposed to

¹³⁰*R. v. Regan*, [1998] N.S.J. No. 356 (N.S.S.C.), released September 15, 1998.

¹³¹*Ibid.* at 13; The court acknowledged that this relationship was originally confirmed by the Supreme Court of Canada in *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385 at 437.

Parliament) writing legislation.”¹³²

Prior to reviewing the pre-amble of the legislation, the Court recognized the range of alternatives the legislators had when contemplating a response to the vacuum in the codified provisions of the *Criminal Code*. The legislators did not adhere to requests for total disclosure that would have completely ignored the complainant’s privacy and equality rights. Similarly, they refuted the position of absolute privilege which would have, of course, ignored the accused’s rights. The Court determined that “like the majority in *O’Connor*, it attempted to strike a balance that would recognize both sets of competing rights.”¹³³ As a result, the Court presumed that Parliament attempted to reconcile both competing rights in a constitutionally valid manner.¹³⁴

In *R. v. N.J.M.*, an accused was charged with sexual assault and buggery offences. Counsel for the accused brought an application seeking production of the complainant’s medical and psychiatric records. The Court held that the application failed to provide any evidence to ground the belief that the complainant’s therapeutic records had any likely relevancy as connected to the issues of the complainant’s state of memory or to her

¹³²*Ibid.* at 18.

¹³³*Ibid.* at 23.

¹³⁴Note: there are additional cases that have considered the constitutionality and upholding Bill C-46 as valid, that have not been reviewed in this essay. These cases include *R. v. Hnyda*, [1997] B.C.J. No. 2600 (B.C.S.C.); *R. v. Weeseekase*, [1997] S.J. No. 790 (Sask. Q.B.); *R. v. G.C.B.*, [1997] O.J. No. 5019 (Ont. G.D.); *R. v. R.F.C.*, [1998] O.J. No. 977 (Ont. G.D.); *R. v. R.* [unreported] Mr. Justice Belleghen, Brampton, Ontario, June 2, 1998 (Ont. G.D.)

competency and credibility.¹³⁵ After review the pre-amble of the legislation and Sections 278.3(4), 278.5(1) and (2), Easton J. determined that he was bound by the legislative enactments. It is important to note, however, he also indicated that this case did not involve a constitutional challenge of the legislation and the Court did not rule on that issue.

The Court went on to comment on the privacy of the complainant and the privacy and sanctity of these records have and that they have now assumed a paramountcy which they may not have enjoyed prior to the recent enactments. The Court held:

Obvious care was taken by Parliament to address a myriad of grounds which it has now stated to be, in and of themselves, insufficient to establish likely relevancy to an issue at trial or to the competency of a witness to testify.¹³⁶

Thus, the Canadian trial courts are far from unanimous on the constitutionality of Bill C-46. Perhaps more importantly for our purposes here, the courts have also given different values to the conflicting interests of the rights of the male accused and those of the female complainants. For example, in the *Mills* case Belzil J. held the law to be unconstitutional and that it could not be saved by section 1 of the Charter primarily because of its impact on an accused person's right to full answer and defence. Contrary to this, the cases that were reviewed here that upheld the Bill as constitutional did so after considering the

¹³⁵*R. v. N.J.M.* (1997), 155 Nfld. And P.E.I.R. 228 at 236.

¹³⁶*Ibid.* at 235. See also A. Young "When Titans Clash: the Limits of Constitutional Adjudication" *supra* note 81 for a discussion regarding the nature of constitutional adjudications that balance these competing interests.

contextual effects of opening and disclosing these counselling records. These effects included society's interest in having sexual offences reported, the integrity of the trial process and the potential for the further humiliation and degradation of the female complainants. Although not specifically articulated in these cases, it is submitted that these positions are the same issues and balances that a section 15 Charter analysis of equality would mandate. Therefore, to be given even greater weight it is urged that these positions of equality should be evaluated by the courts within a section 15 Charter right.

3. L.L.A. v Beharriell

In *L.L.A. v. Beharriell*,¹³⁷ the compendium criminal case to *O'Connor*, Beharriell was charged with indecent assault. The allegations dated back some 13 years prior to the charge being laid. In 1992, the complainant went to a public hospital care centre and a second adult women's counselling centre to obtain counselling for the difficulties that she was suffering as a result of the alleged sexual abuse. Prior to the trial, Beharriell brought a motion for the production of the complainant's counselling records. The motion was adjourned to be determined by the trial judge. The Crown served and filed notices to quash the *subpoenas* served on the two counselling organizations. The trial judge dismissed the Crown application to quash the *subpoenas*. The trial judge also held that the records were not privileged and ordered the production of the counselling records.

¹³⁷(1995), 103 C.C.C. (3d) 92 (S.C.C.).

Eventually, the complainant and the two counselling organizations appealed the issue to the Supreme Court of Canada. In the meantime the trial judge stayed the order for production pending the outcome of the appeal.

The Supreme Court of Canada allowed the appeal because the procedures for the production of the counselling records as set out in the *O'Connor* case were not followed.

In part, because neither the trial judge nor the parties had the benefit of the Court's decision in *O'Connor* at the time of the original motion, Beharriell was allowed to renew his request at his trial under the two stage process enunciated in *O'Connor*.¹³⁸

Lamer C.J.C. and Sopinka J., with Cory and Major J.J. concurring, wrote for the majority. Related to the procedure and the substantive issues connected with the production of the sexual assault counselling records in the hands of third parties, they simply endorsed the law as it was established in *O'Connor*.

L'Heureux-Dubé J., with LaForest and Gonthier J.J. concurring, agreed with the majority's result but expanded her reasons as she addressed the issue of privilege. She concluded that the private records of a sexual assault criminal proceeding should not, as a class, be considered as privileged communications.

Still, she did provide reasons that may prove to be helpful for the courts as guidelines for

¹³⁸*Ibid.* at 129.

assessing applications for the production of these types of materials. In particular she began her reasons by articulating some basic evidentiary first principles. She noted that “all relevant information is presumptively admissible at trial” although “some probative and trustworthy evidence will be excluded to serve overriding social interests.”¹³⁹ This exception creates privilege within the scheme of public policy. L’Heureux-Dubé J. described the traditional justification for legal privilege as utilitarian or “instrumental” considerations that focus on the societal importance of certain relationships.¹⁴⁰ She explained:

Essentially, this rationale asserts that communications made within a given relationship should be privileged only if the benefit derived from protecting the relationship outweighs the detrimental effects of privilege on the search for the truth.¹⁴¹

This passage would seem to support the notion that courts should be considering the effect that the opening of such records might have on the willingness of sexual assault victims to either seek counselling or coming forward to the police with their complaints of sexual abuse.

L’Heureux-Dubé J. also highlighted a second non-utilitarian viewpoint to justify privileged communications founded on a more abstract proposition. This perspective was anchored

¹³⁹*Ibid.* at 107.

¹⁴⁰*Ibid.* at 107.

¹⁴¹*Ibid.* at 107; see also M. Neuhauser in “The Privilege of Confidentiality and Rape Crisis Counselors” (1985) 8 Women’s Rts L. Rep. 185; R. Weisberg “Defendant v Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privilege” (1977-78) 30 Stan L. R. 935 at 940 to 942.

in fundamental individual values that align themselves more with the principles protected in the *Charter*. Specifically, regarding the communications within the context of the counsellor and sexual assault complainant relationship she quotes Anna Joo:

Whereas the utilitarian rationale views the goal of counselor- patient privilege as promoting beneficial future relations, the privacy justification perceives the main purpose of the privilege as shielding the patient from the harm that the disclosure may cause. According to the privacy justification, some human relationships are fundamental to human dignity and should be free from state interference.¹⁴²

Within the scope of L'Heureux-Dubé J.'s analysis of privilege she concedes that there is a strong contention for protecting the confidentiality of the records of communications between a counsellor and a sexual assault complainant. These arguments for privilege were broken down into five categories. First, that sexual assault counselling relationships are based and depend on confidentiality. This confidentiality was recognized as essential in "creating the sense of security necessary to encourage the free flow of discussion which is crucial to the victim's recovery."¹⁴³

Second, without confidentiality sexual assault victims will be deterred from seeking

¹⁴²*Ibid.* at 108; see also A. Joo, "Broadening the Scope of Counselor – Patient Privilege to Protect the Privacy of the Sexual Assault Survivor" (1995), 32 Harv. J. on Legis. 255 at 260; "Developments in the Law – Privilege Communications" (1985), 98 Harv. L. Rev. 1450; *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 at 315 (S.C.C.).

¹⁴³*Ibid.* at 115; see also K. Williamson "Confidentiality of Sexual Assault Victim – Counselor Communication: A Proposed Model Statute" (1984) 26 Ariz. L. R. 461 at 466 to 467; C. Scarmeas, "Rape Victim-Rape Crisis Counselor Communications: A New Testimonial Privilege" (1981-1982) 86 Dick. L. Rev. 539 at 543 to 544; M. Lawrence "Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege" (1984) 17 U.S. Davis L. Rev. 1213 at 1223 to 1224.

treatment or from discussing with their counsellors all of the information connected to the harm suffered. This effect would be harmful to both the victims and to society as a whole.¹⁴⁴

Third, the possible repercussions of the chilling effect of anything that deters victims from seeking counselling which may lead victims to report these crimes to the authorities will accentuate the under-reporting of these type of offences. This is particularly significant because according to Statistic Canada only 6% of the sexual assaults surveyed in 1993 were reported to the police.¹⁴⁵ Concerns of female complainants over the police and the courts treatment of their allegations deters a significant portion of women from reporting these criminal transgressions to the authorities. In contemplation of the contextual application of the law L'Heureux-Dubé J. wrote:

The legal system has a direct and vital interest in promoting the reporting of sexual assaults. It is important to recognize the impact that procedural and substantive rules have upon the resolve of sexual assault victims to obtain treatment and upon the reporting of crimes of this nature. Therefore, the societal importance of the relationships between counsellors and sexual assault complainants necessarily goes beyond the benefit to the victims: it also vitally linked to the effectiveness of the criminal justice to deal with sexual assault crimes.¹⁴⁶

Fourth, the records of statements made in the course of medical or therapeutic treatments

¹⁴⁴*Ibid.* at 115 to 116.

¹⁴⁵J. Robert "Criminal Justice Processing of Sexual Assault Cases" (1994), 14 : 7 *Juristat* 3; and Canadian Panel on Violence Against Women, *Changing the Landscape: Ending the Violence – Achieving Equality* (1993) at 28 to 29.

¹⁴⁶*L.L.A. v. Beharriell*, *supra* note 137 at 116.

are hearsay and intrinsically unreliable. This unreliability, in part, stems from the fact that the records are gathered in a medical or therapeutic context. Treatment in these situations requires that counsellors inquire into personal history, thoughts, emotional and other trial irrelevant information. The purpose of maintaining these records is to assist in counselling not to create an accurate historical *verbatim* record. Also, these records are not necessarily produced contemporaneously with the counselling sessions. All of these factors combined accentuate the therapeutic or counseling notes unreliability.¹⁴⁷

Fifth, the common law principles governing privilege need to be compatible with *Charter* values including female victims' privacy and equality interests. This position is bolstered by a review by the Court of other *Charter* values, such as the right to freedom of religion and expression. In these instances we are able to observe how the Canadian courts have consistently considered the application of such principles in relation to the constitutional rights affected.¹⁴⁸ The links that exist between laws and their societal consequences have been highlighted and considered.

Still, regardless of these arguments, L'Heureux-Dubé J. rejected a class privilege for these

¹⁴⁷*Ibid.* at 117; see also M. MacCrimmon and C. Boyle, "Equality Fairness and Relevance: Disclosure of Therapists Records in Sexual Assault Records in Sexual Assault Trials, in Canadian Institute for the Administration of Justice, *Filtering and Analysing Evidence in an Age of Diversity* (Montreal: Editions Themis, 1993) 81 at 103 to 105.

¹⁴⁸*Ibid.* at 117 to 118; see also M. MacCrimmon, "Developments in the Law of Evidence: The 1991-92 Term Truth, Fairness and Equality" (1993), 4 Sup. Ct. L. Rev. (2d) 225 at 258 to 259.

private records. Given the principle aim of our criminal justice system's adversarial process is the search for truth, she concluded:

A class privilege is a complete bar to the information contained in such records, whether or not relevant, and the onus to override it is a heavy one indeed. The particular concerns raised by the recognition of a class privilege in favour of private records in criminal law relate to: (1) the truth-finding process of our adversarial procedure; (2) the possible relevance of some private records; (3) the accused's right to make full answer and defence; (4) the categories of actors included in a class privilege; and (5) the experience of other countries.¹⁴⁹

On this last point, the experience of other countries, L'Heureux-Dubé J. examines both the American and some of the Commonwealth countries' positions. She concludes the American position regarding privileged communications is "somewhat similar" to that of Canada, although the communications "between counsellors and sexual assault complainants, are considered privileged as a result of the enactment of statutory privilege, both by the federal government and by the states".¹⁵⁰ In the Commonwealth, public interest immunity or Crown privilege allows for the non-disclosure of relevant evidence when considerations of public policy outweigh the importance of full disclosure. This is a

¹⁴⁹*Ibid* at 119. A comparative view of privileged communications can be found at pages 108 to 114.

¹⁵⁰*Ibid.* at 111. Alaska, California, Connecticut, Florida, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Pennsylvania, Utah and Wyoming provide for an absolute protection of privacy records relating to sexual assault complainants in criminal trials. A search was not conducted to determine whether any of these statutes have been tested to date regarding their constitutionality vis-a-vis the Six and Fourteenth Amendments. Some state courts have ruled the absolute privileges as unconstitutional due to the infringements of the defendant's rights: see *In re Robert H.*, 509 A.2d 475 (1986); *Commonwealth v. Samuels*, 511 A.2d 221 (1986). Yet two states, Pennsylvania and Illinois have found the privilege to be constitutional: see *Commonwealth v. Wilson*, 602 A.2d 1290 (1992) and *People v. Foggy*, 521 N.E. 2d 86 (1988) respectively.

common law privilege. In criminal law this immunity cannot prevent the disclosure of documents that “can enable the accused to resist an allegation of crime or to establish innocence.”¹⁵¹

Thus, the Court rejected the notion of a class privilege for these type of counselling records. Instead of a class privilege, a balancing of *Charter* values process was preferred by the Court. This is the same method applied in the *O'Connor Case*. L'Heureux-Dubé J. supports the ideal that the constitutional values required to be balanced in these types of disclosures instances are: (1) the right to full answer and defence; (2) the right to privacy; and (3) the right to equality before the law without discrimination.¹⁵² The rationale used to support this conclusion is referred back to the passages already discussed from the *O'Connor Case* and from Lamer C.J.C.'s conclusions in the *Dagenais Case*¹⁵³ that refute a hierarchal approach to interpreting *Charter* rights and promotes a balancing of competing interest process.¹⁵⁴

¹⁵¹*Ibid.* at 114. See also *Duncan v. Cammell, Laird & Co.* [1992] A.C. 624 (H.L.). Still no commonwealth countries have addressed the private records of a sexual assault complainant. L'Heureux-Dubé J. reviewed other cases related to governmental documents, police informants and social worker logs, and concluded that it would be “doubtful that public interest immunity would bar disclosure of such records when the accused's guilt or innocence is at stake.” (at page 114).

¹⁵²*Ibid.* at 124.

¹⁵³*Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 245 at 316 to 317 (S.C.C.).

¹⁵⁴*L.L.A. v. Beharriell*, *supra* note 4 at 126.

4. Civil Law Comparison

After the Supreme Court of Canada considered the procedure for disclosing a sexual assault complainant's therapeutic records during the course of a criminal trial, they reviewed the same issue within the context of a civil law suit. In *M.(A.) v. Ryan*¹⁵⁵ a female plaintiff commenced a civil action for damages allegedly caused by the defendant's sexual conduct. Specifically, it was alleged that when she was 17 years old she received psychiatric treatment from Ryan. During the course of the treatment Ryan had sexual relations with the plaintiff, and committed acts of gross indecency while in her presence. The plaintiff asserted that this conduct injured her and therefore she sued for damages.

To resolve the difficulties allegedly caused by the conduct of the defendant A.M. sought psychiatric treatment from another counsellor. Concerned about her privacy, the new counsellor assured A.M. that their private communications would remain confidential. This led the new counsellor to refrain from taking the usual kind and amount of counselling notes.

Ryan requested production of A.M.'s reports and counselling reports and notes. At a hearing before a Master for disclosure, A.M. agreed to release her reports but refused to disclose the notes taken during the counselling sessions and claimed privilege over the

¹⁵⁵[1997] 1 S.C.R. 157.

notes in question.

The Master held that there was no privilege and ordered the notes to be disclosed. The British Columbia Supreme Court affirmed that decision. The British Columbia Court of Appeal allowed A.M.'s appeal in part, but ordered the disclosure of her reporting letters and her notes relating to the discussions between A.M. and her new counsellor. The production of these materials were held to be "protected"¹⁵⁶ by four conditions:

that inspection be confined to Dr. Ryan's solicitors and expert witnesses, and that Dr. Ryan himself could not see them; that any person that saw the documents should not disclose their contents to anyone not entitled to inspect them; that the documents could be used only for the purposes of the litigation; and that one copy of the notes was to be made by Dr. Ryan's solicitors, to be passed on as necessary to Dr. Ryan's expert witnesses.¹⁵⁷

The majority¹⁵⁸ of the Supreme Court of Canada dismissed the appeal. McLachlin J. writing for the majority reviewed the four requirements for a privilege to exist for the communications between a psychiatrist and a patient. First, the communications at issue must have originated in a confidence that they will not be disclosed. Second, that the element of confidentiality be essential to the full and satisfactory maintenance of the relation between the parties to the communication. Third, the relation must be one, which in the opinion of the community, ought to be sedulously fostered. And fourth, the interests served by protecting the communications from the disclosure outweigh the interests of

¹⁵⁶*Ibid.* at 167.

¹⁵⁷*Ibid.* at 167.

¹⁵⁸LaForest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.; L'Heureux-Dubé J. dissenting.

pursuing the truth and disposing correctly of the litigation.¹⁵⁹ It is important to note that this fourth requirement assumes that the opening and disclosing of such records will in some manner foster the pursuit of truth and the correct disposal of the law suit. It is proposed here that this represents stereotypical rationale and a bias of the Court as to the nature of the communications between the plaintiff and her counsellor. Without an evidentiary foundation of relevance, the court is left with an illogical presumption of relevance – there may be something in the notes that will help determine an issue of credibility.

The Court went on to hold that in this case the first three conditions for the privilege for the communications existed here. McLachlin J. held:

It may thus be concluded that the first three conditions for privilege for communications between a psychiatrist and the victim of a sexual assault are met in the case at bar. The communications were confidential. Their confidence is essential to the psychiatrist – patient relationship. The relationship itself and the treatment it makes possible are of transcendent public importance.

The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interests of pursuing truth and disposing correctly of the litigation.¹⁶⁰

The Court went on to establish that “once the first three requirements and a compelling *prima facie* case for protection is established”¹⁶¹ the focus shifts to the balancing of competing interests considered by the fourth requirement.

¹⁵⁹*M(A.) v. Ryan*, *supra* note 155 at 173 to 175.

¹⁶⁰*Ibid.* at 174.

¹⁶¹*Ibid.* at 179.

McLachlin J. acknowledged the importance of the *Charter* values protected by sections 8 (search and seizure) and 15 (equal treatment and benefit of the law) and wrote:

A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of a sexual assault does not obtain the equal benefit of the law to which s. 15 of the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price that she must pay to claim redress – redress which in some cases may be part of her program of therapy. These are factors which may properly be considered in determining the interest served by an order for protection from disclosure of confidential patient-psychiatrist communications in sexual assault cases.¹⁶²

Nonetheless these interests must still be balanced against the society's interest in the “pursuing the truth and disposing correctly of the litigation.”¹⁶³ Furthermore, disclosure must be produced to “get at the truth and prevent an unjust verdict.”¹⁶⁴

The Court specifically rejected the all or nothing approach adopted by the Supreme Court of the United States in *Jaffee v. Redmond*,¹⁶⁵ which endorsed an absolute privilege for all psychotherapeutic records. Alternatively, the Court adopted the position established in

¹⁶²*Ibid.* at 175 to 176.

¹⁶³*Ibid.* at 175.

¹⁶⁴*Ibid.* at 177.

¹⁶⁵116 S. Ct. 1923 (1996).

*O'Connor*¹⁶⁶ wherein the test was developed for the production of third party therapeutic records. This test balances the competing interests by reference to a number of factors including the right of the accused to full answer and defence and the right of the complainant to privacy.

Finally, on the issue of the production of the counselling notes the Court held that despite the “compelling” interest in preserving the confidentiality of the communications in issue the notes should be disclosed. The Court went on to protect the rights of the patient by accepting the conditions attached to the disclosure as set out by the British Columbia Court of Appeal.

Still, it is the view of this writer that these conditions only limit the invasion of privacy to a restricted number of people all working for the defendant. This presents the patient with the same limitations as were presented to sexual assault complainants in the criminal context developed in the *O'Connor* Case. Therefore, if this is the reality that women face in the civil justice system, the same results may dissuade women from using this court process as well. The end result is limited access for women who have been sexually assaulted to any form of conventional justice.

L'Heureux-Dubé J. in dissent, reviewed that similar applications within a criminal context, requires that the courts assess a proportional balance between *Charter* rights. On this issue

¹⁶⁶*Supra* note 1.

of balancing *Charter* values she contemplated her position articulated in *O'Connor* and wrote:

...the rights to individual liberty and security of the person as enshrined in s.7 of the *Charter* encompasses a right to privacy. This finding was based on a number of developments in the jurisprudence of this Court. In its s.7 jurisprudence, it has expressed great sympathy with the notion that liberty and security of the person involve privacy interests. That privacy is essential to human dignity, a basic value underlying the *Charter*, has also been recognized. Our right to security of the person under s.7 has been found to include protection from psychological trauma which can be occasioned by an invasion of our privacy. Certainly, the breach of the privacy of a sexual assault plaintiff constitutes a severe assault on her psychological well-being. Section 8 also reveals that the *Charter* is clearly premised on a respect for the interests of individuals in their privacy. Finally, the common law of torts of defamation and trespass further recognize the validity of an individual's claim to further privacy interests.¹⁶⁷

L'Heureux-Dubé J. went on to distinguish between the strong public interest in the relationships between a patient and a counsellor and the nature of the records themselves and the effects of the disclosure would have asserting her expectation to privacy right. This is what distinguishes the basic premise or value of the right to privacy from the doctrine of privilege.¹⁶⁸ More specifically, that once the privacy is violated it cannot be regained. Again comparing the context of a criminal application for disclosure and the civil application for production, L'Heureux-Dubé J. held:

...the discovery process has the potential to allow a far more serious incursion upon a plaintiffs' reasonable expectation of privacy than on plaintiffs in other types of tort cases. These case are somewhat unique. As was observed in *O'Connor*, *supra*, at pp. 487-88, the wrong involved here, sexual assault, may create a need for a therapeutic response if the victim is to restore herself to a state of healthy functioning. As Dr. Paritt's affidavits

¹⁶⁷*A.M v. Ryan*, *supra* note 155 at 199.

¹⁶⁸*Ibid.* at 200.

attest, effective counselling requires that the most intimate details of a patient's life and her innermost thoughts, fears, and feelings be freely shared with the therapists. At the same time, it often requires that the counsellor keep records of what has transpired during the sessions with the plaintiff. A plaintiff may also maintain a private diary of these experiences, thoughts, and feelings.¹⁶⁹

She concludes that the discovery of such materials will act as strong disincentive to plaintiffs to recover damages for the injuries suffered by either preventing the commencement of the litigation or may encourage unjust settlements to avoid the disclosure of private records and notes. Such results are inconsistent with section 15 equality rights as guaranteed by the *Charter*.¹⁷⁰

In her dissenting judgement she agrees with the majority that a successful claim of privilege had been made out that established that records were exempt from disclosure. She also agreed with the Court of Appeal's general conclusion that it had a broad discretion to control the process of discovery to ensure that the remaining documents and their disclosure did not affect any of the parties unjustly. However, it was her view that the discretion exercised in these circumstances did not result in an "appropriate balance of the *Charter* values of privacy, equality, and fair trial."¹⁷¹ Given the nature of the documents and notes, and the potential harm that would flow from an invasion of privacy relating to such sensitive and questionably relevant matters, she preferred a process that would allow

¹⁶⁹*Ibid.* at 205.

¹⁷⁰*Ibid.* at 205.

¹⁷¹*Ibid.* at 211.

a judicial officer to first review the materials. Specifically, she held:

By failing to screen the private records in such cases, the courts create a hierarchy of Charter values, where interests in privacy and equality may be seriously affected for records or parts thereof which may provide very little if any benefit to the defence or be unnecessary to ensure the fairness of the proceedings. Procedures adapted to the context of discovery in civil proceedings from the principles developed by this Court in *O'Connor* are in order.¹⁷²

How then does one reconcile these two different approaches? Is there a fundamental distinction between the criminal trial process and the civil trial process when it relates to this disclosure issue? It is contemplated here that the majority in the *Ryan* Case hinge their position on the common law principle behind the recognition of an exception or “privilege” regarding the disclosure based on the “fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court so that the truth may be ascertained.”¹⁷³ An exception or privilege to this component of the fact finding mission may exist where it can be established that a public good transcends this goal. Once again competing interests need to be balanced. However, the Charter’s application to this balancing process is distinguishable in the two justice systems.

More specifically, the Charter’s application to common law principles within the realm of private litigation is unlike criminal cases, wherein government action is challenged.

McLachlin J. described the difference as follows:

The most that the private litigant can do is argue that the common law is consistent

¹⁷²*Ibid.* at 212.

¹⁷³*Ibid.* at 170.

with *Charter values*. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will “apply” to the common law only to the extent that the common law is found to be inconsistent with *Charter* principles.¹⁷⁴ [emphasis hers]

L’Heureux-Dube similarly resolves the conflict. In *O’Connor* the female complainant’s privacy interests were balanced against the accused’s section 7 Charter right to make full answer and defence. Contrary to this, the defendant in a civil proceeding does not have a direct Charter right to be guaranteed. Even though similar values are in issue the defendant’s liberty is not in jeopardy. She, quite properly, is concerned about a miscarriage in justice that would result in an incorrect finding of fact. Again the balancing process is implemented between the plaintiff and the defendant but here the interests are framed within Charter *values*, because these interests (as is the case with an accused person within the criminal sphere) are not absolutes. She described the dichotomy as follows:

In many cases, the exercise of discretion, through the making of an order, for example, will not constitute direct state action and therefore cannot be subject to the same constitutional scrutiny as legislation or the acts of state officials. Where this occurs, this Court has nonetheless found that the exercise of discretion must adequately reflect the values underlying the *Charter*. In the criminal context, a proportional balance of the effects on *Charter* rights is required... In cases of non-criminal law powers exercised in the context of legislation with a public purpose or other state action, the court must also reflect a balance of *Charter* values when exercising a statutory or common law discretion...¹⁷⁵

¹⁷⁴*Ibid.* at 172.

¹⁷⁵*Ibid.* at 191. In this passage she cites *R. v. O’Connor*, *supra* at note 1; *L.L.A.*, *supra* note 129; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *R. v. Park*, [1995] 2 S.C.R. 836 as examples criminal cases. For civil references she cites *Degenais v. Canadian*

(E) Conclusion

A review of the creation of Bill C-46 provides an interesting perspective on how a statutory law is created in Canadian society, and some of the complexities of the competing interests, including the gender issues connected to the production of a female complainant's therapeutic records. Further, it provides an illustration to assess the criminal justice system's treatment of female sexual assault complainants. Chronologically, it was pointed out that while the Federal Department of Justice was contemplating a new piece of legislation to fill a void and respond to an issue in the common law regarding the production and disclosure of a complainant's therapeutic records, a specific fact driven issue arose relating to the disclosure of certain records. As the British Columbia Court of Appeal attempted to balance competing interests between the accused's right to make full answer in defence and the rights of the female complainant, the Court structured a procedural scheme in an attempt to resolve such issues in a fair manner. The case of *R. v. O'Connor* was eventually appealed to the Supreme Court of Canada. Here further refinements to the process were formulated, and perhaps more importantly, the competing interests of the participants were balanced in favour of the accused's right to make full answer and defence. The Court concluded the prioritized harm should be focused on the danger of a wrongful conviction. It was argued that this effectively created a hierarchy of

Broadcasting Corp., [1994] 3 S.C.R. 835, *per* Lamer C.J. for the majority, at 875; *Baron v. Canada*, [1993] 1 S.C.R. 416; *Hills v. Canada (Attorney General)*, [1998] 1 S.C.R. 513 at 558.

rights, with the rights of the male accused being “balanced” above the competing rights of the female complainant. Then the Federal Department of Justice, as sanctioned by the democratic process, drafted and passed specific legislation to deal with the issue. Bill C-46 was drafted with significant consultation and the advantage of having contemplated both the majority and the minority’s perspectives on the issues in *R. v. O’Connor*.

In an attempt to balance often diametrically opposed interests and rights, Bill C-46 was created. That of course, did not end the debate, as the next wave of sexual offence prosecutions brought with them a number of constitutional challenges to the legislation. It was through an examination of the language used by the courts that revealed a continued reliance by some on gender based stereotypical myths. Juxtaposed to these decisions, a number of cases were examined that upheld the Bill as constitutional. Attempts were made to compare the differences in the positions based on the respective courts’ considerations and reliances upon both the individual harm suffered by the complainants as well as the overall societal harm connected to the under-reporting and the community’s access to criminal justice. Now, as a nation, we await a second assessment of similar issues by the Supreme Court of Canada in *R. v. Mills*. Given the evolution of section 15 equality interests post *O’Connor*, particularly as contemplated in the *Laws* Case, one might predict the Court will enunciate additional views on the equality rights component of the competing interests in issue.

Support for this prediction can also be found in the case of *L.L.A. v. Beharriell*. In this

case the majority of the Court did not elaborate on the pros and cons of a class of privilege and merely endorsed their earlier procedural position as enunciated in the *O'Connor Case*. L'Heureux-Dubé J. concurred with the majority's reliance on the procedure set out in the *O'Connor Case*, however she also elaborated on a number of policy considerations. These considerations included the contextualization of the potential harm and impact on equality that the disclosure of a sexual assault complainant's records has on female victims' access to justice. Still, in the end, the minority of the Court preferred a balancing process as compared to a class of privilege for the notes and records in question. Through the Canadian civil law comparison we saw the same Court¹⁷⁶ address the same issues yet with a different perspective. In the case of *M.(A.) v. Ryan*, the entire Court considered the female plaintiff's equality rights as guaranteed by the *Charter*, or at a minimum equality interests within the realm of *Charter* values. The application of the law and its impact on women, particularly as litigants, was considered. The Court disagreed on a number of issues that were examined, but in the end, agreed on the superior value of allowing a trial judge to balance the competing and irreconcilable interests of the parties over the creation of a class or category of privileged documents.

Thus, through the example of the disclosure of sexual assault complainant's counselling records we are able to observe the varying degrees with which the Canadian courts have either neglected entirely a "contextualized approach" to assessing the balancing of the

¹⁷⁶Lamer C.J.C. and Gonthier J. who sat on the *O'Connor* panel did not partake in the civil hearing.

female complainants' interests and their *Charter* guaranteed rights, or when contextualized factors like individual or societal harm were assessed, the female parties' interests were more often than not balanced below the rights of the male accused party. This result was consistently rationalized through the fundamental tenet of our criminal justice system – that an innocent person must not be convicted. My point here is that while this notion is supremely important, the courts must not abandon a female complainant's right to be treated fairly with dignity and equality in the courts search for the truth. These concepts must be addressed within a contextual framework, particularly focused on the different components of harm that flow from the opening, reviewing and disclosing of these most private documents. These issues must be carefully contemplated as the trial courts embark on their assessment of determining the factors set out in Bill C- 46 at both stages of the disclosure process, assuming the legislation survives its challenge in the *Mills* case. If it does not, it is hoped the drafters of the replacement legislation appreciate the complexity and consequences of the issues in addition to the need balance dignity, respect and trial fairness from all perspectives. To do otherwise is effectively reducing female complainant's and the community's access to real justice.

CHAPTER THREE: DOMESTIC VIOLENCE

(A) INTRODUCTION

Much has been written about the problem of domestic violence. Sociologists, anthropologists, psychologists, politicians, criminologists as well as lawyers and legal theorists have all added volumes to our understandings about this form of violent behaviour and the law's reaction to it. It is not the aim of this chapter to review all of this data, as that in and of itself has been the dedication of entire journals.¹ The social phenomena of wife battering is an extremely complicated matter with much debate going on within each of the disciplines outlined above regarding its many layers of intricacy and possible solutions. The aim of this chapter is to examine two different responses of the criminal justice system to domestic violence, recently instituted in Ontario. The framework within which these two models will be discussed is the depth in which they have considered the broad context of domestic violence. It is argued here that while significantly better than the criminal justice system's conventional approach to domestic violence, both of these models have failed to completely assess the many different and sometimes conflicting aspects of the problem. Because of this, the solutions proposed fall short of the mark of providing the victims of domestic violence not only equal access to justice but, more importantly, the protection on which their lives often depends.

¹See the *Journal of Interpersonal Violence* (Thousand Oaks, Cal.: Sage Periodicals Press). This journal is concerned with the study and treatment of victims and perpetrators of physical and sexual violence.

This chapter first describes the criminal justice system's conventional approach to dealing with the offence of assault within a domestic relationship. The shortcomings of this approach are set out and then highlighted by some of the theories that attempt to isolate the cause or causes of the violent behaviour. Once these theories are briefly presented the two responses, the K Court and the Plea and Conditional Discharge Court, are outlined. Following this descriptive process, the chapter attempts to analyze these two responses first from a practical perspective and then from a theoretical view point. In short, it is argued that both models have oversimplified the problem (causes and consequences) and, as a result, have provided the community with an incomplete solution. Finally, some judicial interpretations of the issue of the admission of hearsay evidence for the truth of its content will be examined to evaluate the effectiveness of the K Court initiative. This is done, in part, to further accentuate women's unequal access to criminal justice in this regard.

(B) THE CONVENTIONAL APPROACH

In Canada, prior to the 1980's, the criminal justice system's treatment of domestic assault charges was much like any other assault offence. The police, as investigative agents of the state, responded to a complaint in an attempt to keep the public peace and protect citizens from being injured. They intervened, took statements, observed and noted injuries and

when they exercised their discretion to do so made arrests.² Once these charges were processed and a court date was set, a crown attorney was assigned the responsibility of having to prosecute these offences. On the day of trial the crown attorney would meet with the female complainant, assuming she responded to the subpoena, and attempt to prepare her for trial. If she failed to attend the proceedings, and she was an essential witness to the matter, the prosecution had a number of choices. The crown could request an adjournment and put the matter over to a future date in the hope that she would attend at that time. The crown could request a material witness warrant under the Criminal Code that would authorize the police to locate, arrest and hold the female complainant - potentially in custody - until the matter could be brought back before the courts.³ Or the

²C. Burris and P. Jaffe "Wife Abuse As a Crime: The Impact of Laying Charges" (1983), 25 Canadian Journal of Criminology 309. This article seeks to explore the reasons why the police were not more willing to lay assault charges. They found that in London Ontario in the year 1979 police laid charges in only 3% in all family violence cases, even though the police advised the victims of the violence to seek medical attention in 20% of the cases. The implications of this situation were examined, including increased feelings of helplessness for the victim, condoning the male batterer's behaviour and the loss of an opportunity to interrupt the cycle of violence that also increases the future risks of abuse for the victim. See also an updated version of this study by P. Jaffe, E Hastings, D. Reitzel and G. Austin, "The Impact of Police Laying Charges" in N. Hilton, ed., *Legal Responses to Wife Assault: Current Trends and Evaluation* (Newbury Park: Sage Publications, 1993).

³Criminal Code section 705 provides that "where a person who has been served with a subpoena to give evidence in a proceeding does not attend or remain in attendance, the court, judge, justice or provincial court judge before whom that person was required to attend may, if it is established (a) that the subpoena has been served in accordance with this Part [Part XXII - Procuring Attendance], and (b) that the person is likely to give material evidence, issue or cause to be issued a warrant in Form 17 for the arrest of that person." Sections 706 and 707 provide for the procedure to be followed when a witness has been arrested under such a warrant. The failure, without lawful excuse, to appear and give evidence when required to do so by law is punishable as contempt of court under section 708.

crown could withdraw the charges as unviable without the cooperation of the material witness, namely the complainant.

If the witness did attend, but was either unwilling to testify completely as to the events as she had described to the police soon after the incident, or was reluctant to testify truthfully and to the full extent as her memory would allow, then the crown then also had a number of choices that could be made. The prosecutor could possibly withdraw the charges again because they were unprovable. Or the prosecutor could require the reluctant, and now recanting witness, to testify in court regardless of her wishes. Once called as a witness where she began to testify in a manner inconsistent with her original description of events as set out in her witness statement, the crown could then make an application under section 9(2) of the Canada Evidence Act⁴ to obtain leave from the court to cross examine his or her own witness regarding the originally prepared statement. This would allow the crown to argue for a ruling made by the court to have the complainant declared as adverse.⁵ Through this process a witness, when faced with contradictory recollections, the possibility existed that she could feel sufficiently pressured to provide the court with evidence that would be consistent with her oath. Practically however, unless the prosecution had additional evidence to call to support the allegations of abuse

⁴Canada Evidence Act R.S.C. 1985, c. C-5.

⁵ For the meaning of adverse see *Wawanese Mutual Insurance Co. v. Hanes* [1963] 1 S.C.C. 321 (S.C.C.); *R. v. Cassibo* (1982), 70 C.C.C. (2d) 498 (Ont. C.A.). It includes a hostility of mind as well as opposed in interest or unfavourable in position to the party calling the witness. Note that “adverse” has been held to mean hostile and not simply unfavourable; see *R. v. McIntyre* (1963), 2 C.C.C. 380 (N.S.C.A.).

as set out in the charges beyond the evidence of the complainant, there would be very little point in having the sole crown witness declared as adverse. The prosecution would simply be left with a “hostile” complainant and no additional evidence to call to prove the charges beyond a reasonable doubt.⁶

Therefore, such a situation left the prosecution no further ahead than it was before the charges were laid. Perhaps even worse off, if the accused having observed the system fail now believes that he is able to manipulate his partner and the criminal justice system. In this scenario there is arguably a reinforcement of the abusive behaviour for both the specific individual as well as for other like-minded individuals already involved the implementation of physical violence within a relationship. Moreover, for the complainant there is an inability for the criminal justice system to provide any immediate help, protection or access to justice.

It is argued here that the failure of the approach described above is grounded in an unresponsiveness by the criminal justice system to an appreciation of the contextualization of the cycle of violence at the very heart of the domestic assault problem. Meaningful and effective solutions require that the causes and consequences of domestic violence must be taken into account by those entrusted to improve the situation. The following section reviews some of the most prominent theories of domestic violence.

⁶For the procedure to be followed in a s. 9(2) application see *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206 (Sask. C.A.), leave to appeal refused (1971), 4 C.C.C. (2d) 566n (S.C.C.).

(C)THEORIES OF DOMESTIC ASSAULT

1. The Cycle of Violence

Lenore Walker is the psychologist who pioneered the work in the field of battered women as victims trapped in a cycle of deceit.⁷ She relied on the cycle of violence and the theory of learned helplessness to describe and explain the three distinct stages of the cycle of violence that occurs in many abusive domestic relationships. The first is the building of tension. This phase is followed by a severe battering incident that typically involves uncontrollable rage. Finally an act of contrition follows the outburst of violence. The violence creates fear and anxiety for the female party during the first two phases. The effect of this is to extend her fear beyond the immediate incidents of violence so that terror begins to seize the entire relationship. As the behaviour repeats itself in a cyclical fashion the female party may realize that the abusive behaviour is unlikely to change, but she is unable to terminate the relationship primarily because of her learned helplessness. It is the woman's learned helplessness that explains why she stays in the dangerous relationship and maintains the unreasonable position that the abusive male will improve and stop the violence.⁸

⁷L. Walker, *The Battered Women* (New York: Harper and Row, 1979).

⁸D. Downs, *More Than Victims; Battered Women, The Syndrome Society and the Law*, (Chicago: The University of Chicago Press, 1996). See "The Key Tenets of the BWS" at 81.

Although the specific cause linked to the cyclical nature of a physically abusive relationship has not been recognized by the Canadian courts, they have accepted into fact its existence. For example, in a commission of inquiry into the deaths of Rhonda and Roy Lavoie, Mr Justice Schulman, commissioner, identified a cycle of violence as being intricately involved in many abusive relationships.⁹ He described the first of three distinct phases as a duration of tension building. During this phase the male party grows increasingly angry, frustrated or out of control, frequently due to experiences outside of his relationship. The male party, unable to express or connect his feelings to these outside factors, attempts to legitimize his feelings by blaming them on matters, real or perceived, associated with his female partner. The male party releases increasing anger and frustration by “minor abusive incidents such as pushing, shoving or calling the woman names.”¹⁰ These incidents become increasingly intense over time. Concurrent to this, the male party becomes increasingly jealous of his female partner and he exerts more control over her life. The female partner fails to understand her male partner’s anger and frustration. As the male party’s behaviour becomes increasingly less rational, the female party begins to believe the abuse is legitimately focused at her. She then adapts by being

⁹Report of the Honourable Mr. Justice P. Schulman, *Commission of Inquiry into the Deaths of Rhonda Lavoie and Roy Lavoie, A Study of Domestic Violence and the Justice System in Manitoba*, (Winnipeg: Manitoba Government Publications, 1997). On January 20th, 1995 Roy Lavoie murdered his wife Rhonda Lavoie. He then committed suicide. They had been dating since Rhonda was 14 years old. They resided together for 7 years and had three children together. Rhonda was 22 years old when she was murdered and Roy was 30 years old when he took his own life. This Commission of Inquiry sought to discover the reasons behind this terrible tragic end, not to assign blame, but to find lessons that hopefully would serve others.

¹⁰*Ibid.* at 15.

conciliatory or avoiding her male partner to prevent any further abuse. However, the male partner's tension continues to build until control is lost and a violent incident occurs. Mr.

Justice Schulman described the nature of these violent outbursts:

The first explosive incident which occurs may be relatively minor, such as the man pushing the woman or calling her hurtful and abusive names. Subsequent abusive incidents become more and more significant, and may ultimately involve serious violence including punching, choking, rape, and the use of weapons or objects. If sexual assault is involved, particularly when objects are used during the assault, the likelihood increases that even greater acts of violence against the women will follow.¹¹

Following this outburst phase both parties experience various forms of shock, disbelief and denial. The male party blames his partner's behaviour as the triggering event. The female minimizes the extent of her injuries or persuades herself that the behaviour was in some way justified. At this point she feels depressed and helpless.

This stage of the cycle is followed by a "honeymoon" phase. During this segment of the cycle the male party becomes apologetic and exhibits charming and loving behaviour. He requests forgiveness and makes promises to change the external factors that the female party believes contributed to the violence, such as alcohol abuse or stress related to employment. This honeymoon phase reinforces the female partner's sense of hope and power, particularly to cause her partner to get help for his assaultive behaviour. At the same time the female party desires to salvage her relationship and isolates herself from friends and family that were a source of her male partner's jealousy. As a result, both

¹¹*Ibid.* at 15.

parties become more and more dependent on each other, and persuade themselves they can overcome their problems together. It is at this stage that the women who have contacted the police frequently urge the prosecutors to drop or withdraw the outstanding charges.

This pattern of behaviour repeats itself over and over again. Regarding the cyclical nature of the violence Mr. Justice Schulman concluded:

it often grows shorter over time, and the severity of the explosive incident generally increases with each cycle. Each cycle a woman passes through tends to lower her self-esteem and impair her judgement. It becomes more difficult for her to leave the relationship, or to recognize that she is not responsible for the violence in her relationship.¹²

The criminal courts have also recognized the cycle of violence theory. Recently, the Supreme Court of Canada had the opportunity to review the battered woman syndrome as a component of self defence. In *Malot v. The Queen*¹³ a female accused was charged with the murder of her husband and the attempted murder of his girlfriend. She was convicted at trial. She appealed first to the Ontario Court of Appeal and then to the Supreme Court Canada, where in both instances her appeals against conviction were dismissed. At trial Dr. P. Jaffe was qualified and gave expert opinion evidence regarding the psychological effects of being a battered woman. Major J., writing for the majority, outlined the uses that could be made of such evidence by a jury. He held that it was permissible to use

¹²*Ibid.* at 16.

¹³(1998), 121 C.C.C. (3d) 456 (S.C.C.).

expert testimony to help explain:

1. Why an abused woman might remain in an abusive relationship.
2. The nature and extent of the violence that may exist in a battering relationship.
3. The accused's ability to perceive danger from her abuser.
4. Whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.¹⁴

2. Complex Post-Traumatic Stress Disorder and Captivity

Psychiatrist Judith Herman theorizes the effects of sustained domestic abuse within the realm post-traumatic stress disorder. Her focus is on the component of control and the mental processes that the victim undergoes after having been subjected to violence in the domestic setting. Herman suggests that:

Some battered women speak of entering a kind of exclusive, almost delusional world, embracing the grandiose belief system of their mates and voluntarily suppressing their own doubts as proof of loyalty and submission...Prolonged captivity also produces profound alterations in the victim's identity. All the psychological structures of the self - the image of the body, the internalized images of others, and the values and ideals that lend a person a sense of coherence and purpose - have been invaded and systematically broken down.¹⁵

This notion is connected to DSM - IV's description of the "acute distress disorder" that

¹⁴*Ibid.* at 464. See also *R. v. Lavallee* (1990), 55 C.C.C (3d) 97; and C. Boyle, "A Feminist Approach to Criminal Defences" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications Ltd., 1991) that advances the theory of contextualizing uniquely female experiences within criminal defences. See also A. Tomkins *et al.*, "Self Defence Jury Instructions in Trials of Battered Women Who Kill Their Partner" in N. Hilton, ed., *Legal Responses to Wife Assault: Current Trends and Evaluation*, (Newbury Park: Sage Publications, 1993).

¹⁵J. Herman, *Trauma and Recovery: The Aftermath of Violence - From Domestic Abuse to Political Terror* (New York: Basic Books, 1992) at 92; as cited by D. Downs *supra* note 7 at 85.

describes the traumatic consequences of experiencing incidents “that involved actual or threatened death or serious injury, or a threat to the integrity of self or others,” and the victim’s responses including intense fear, helplessness, or horror.¹⁶

3. Battered Women as Survivors

Others, such as E. Gondolf, believe that the women in abusive relationships are active participants in the interaction of the relationship and in the creation of their own self identity. He supports the notion that they are not responsible for the abuse and the violence but, that as the violence escalates, they recognize that self blame is inappropriate and as result they seek outside help as the relationship becomes less caring and increasingly dangerous. This perspective concentrates on a system failure rather than a failure of any sort at the feet of the battered woman. The concept of learned helplessness is not completely abandoned as it explains the resulting behaviour of the abused woman who attempts to get help outside of the relationship, such as in shelter, the police or perhaps the criminal justice system, but fails to get the help and support she needs. D.

Downs summarizes E. Gondolf’s interpretation of learned helplessness as:

If these efforts fail, learned helplessness might set in and women might lose a sense of the “observing self,” which is an attribute of reflective judgement and autonomy. With the appropriate shelter or related help, however, *a new definition of self* can arise, phoenix-like: *the transition*

¹⁶Diagnostic and Statistical Manual of Mental Disorders : DSM - IV, 4th ed., (Washington DC.: American Psychiatric Association, 1994), section 308.3.

*from helpless victim to survivor.[emphasis his]*¹⁷

4. Masochism

Some theorists believe that the women in abuse relationships are sometimes complicit in their own victimization.¹⁸ Freudian theorists suggest that women are predestined to be masochistic as a result of psychodynamic factors unique to women's psychological development. In response to this position, feminist theorists argue if women are masochistic in this manner they are made that way by experience. They reject the idea of a gender predetermination and provide a political and social explanation, grounded in a woman's disempowered position in a world dominated by men.¹⁹ Still others point to a number of reasons that abused women remain in violent relationships, such as their own exposure to domestic violence as children, psychological factors involving self destructive behaviour, psychological dependency and the lack of access to both the social and the economic resources to leave the relationship. For example, Dutton and Painter

¹⁷D. Downs, *supra* note 7 at 86, summarizing E. Gondolf, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (Lexington, Mass.: Lexington Books, 1988). See also M. Whalen, *Counseling to End Violence Against Women: A Subversive Model*, (Thousand Oaks: Sage Publications, 1996) at 27.

¹⁸See J. Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (New York: Pantheon, 1988).

¹⁹See M. Masse, *In the Name of Love: Women, Masochism, and the Gothic* (Ithaca NY: Cornell University Press, 1992). She discusses how the powerless and oppressed seek power and esteem through subversive acts which are products of their situations. See also R. Lenton, "Power Versus Feminist Theories of Wife Abuse" (1995) 37 *Canadian Journal of Criminology* 305.

contemplate a “traumatic bonding” theory wherein they describe a cycle of counter dependency that starts with the male party’s assaultive behaviour and significant dependency needs. They support the notion that the male is responsible for the destructive components of the relationship, particularly the abuse. On the other hand, to avoid the violence, the woman starts to modify her life around the demands of her abusive partner and thereby isolates herself from external support. In turn, her compliance to his controlling demands legitimizes his power. Her compliance makes her counter-dependent upon her male partner which, in turn, contributes to her inability to terminate the relationship. This counter-dependency also causes anxiety and distress for the woman as she fears losing her partner that she has become psychologically, and perhaps economically dependent upon.²⁰

5. Other Theories

A detailed description of all of the different theories that have attempted to explain the causes of domestic abuse is beyond the scope of this work.²¹ Still, given the complicated nature of this troublesome social phenomena, some of these theories should at least be noted. Within the realm of determinants that have been directed at the male abuser,

²⁰D. Dutton and S. Painter, “Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse” (1983) 6 *Victimology* 139 at 145.

²¹For an excellent review of the theories related to the causes of domestic violence can be found in The National Research Council, N. Crowell and A. Burgess eds., *Understanding Violence Against Women* (Washington: National Academy Press, 1996).

explanations to account for the violence that occurs within a domestic relationship have included; evolution,²² physiology and neurophysiology,²³ alcohol abuse,²⁴ psychopathology and personality traits,²⁵ attitudes and gender schemas,²⁶ sex and power motives,²⁷ as well as social learning theories.²⁸ Other theorists have focused on the dyadic

²²V. Quincey and M. Lalumiere, "Evolutionary Perspectives on Sexual Offending," (1995) 7(4) *Sexual Abuse* at 301 to 315; as cited by The National Research Council, *supra* note 21. They suggest that sexual violence may be explained by evolutionary theories modified by specific attitudes toward females combined with an erotic interest in violent sexual behaviour.

²³See J. Archer, "The Influence of Testosterone on Human Aggression" (1991), 82 *British Journal of Psychology* 1; as cited by The National Research Council, *supra* at note 21, for a comprehensive review of the literature on the topic.

²⁴ See G. Kantor, "Refining the Brushstrokes in Portraits on Alcohol and Wife Assaults" in *Alcohol and Interpersonal Violence: Fostering Multidisciplinary Perspectives* NIAAA Monograph 24, NIH Publication No. 93-3496 (Rockville Md.: National Institute on Alcohol and Alcoholism, National Institutes of Health, U.S. Department of Health and Human Services, 1993); as cited The National Research Council, *supra* note 21. In this study it is reported that men's drinking habits, particularly binge drinking, are related to domestic violence across all ethnic groups and social classes.

²⁵S. Hart, D. Dutton, and T. Newlove "The Prevalence of Personality Disorder Among Wife Assaulters" (1993), *Journal of Personality Disorders* 7(4) 328; as cited in The National Research Council, *supra* note 21. This study found a high incidence of psychopathology and personality disorders among men that physically abuse their female partners.

²⁶ For example men, in general, have been found to be more accepting of men abusing women and the more culturally traditional those men appear to be the more accepting they are of the abuse. C. Greenblat "Don't Hit your Wife...Unless: Preliminary Findings on Normative Support For the Use of Physical Force by Husbands" (1985), 10 *Victimology* 221; as cited in The National Research Council, *supra* note 21.

²⁷A. Browne and D. Dutton, "Escape from Violence: Risks and Alternatives for Abused Women - What do we Currently Know?" at 65 in R. Roesch, D. Dutton, and V. Sacco, eds., *Family Violence: Perspectives on Treatment, Research, and Policy* (Barnaby B.C.: British Columbia Institute on Family Violence, 1990). This article reports that power and control frequently underlie intimate relationship violence, although the purpose of the

contexts or features unique to the relationships wherein this type of behaviour has been documented.²⁹ Some have looked to societal influences such as sexual scripts and cultural mores to account for the abusiveness.³⁰ As well, institutional influences such as family, educational settings, religions, and media have been studied to determine their respective impacts on domestic violence.³¹ While still others have searched for multi factor models

violence may be linked to the male party's own feelings of powerlessness and inability to accept rejection.

²⁸ Social Learning theorists suggest that human behaviour is learned by observing others, forming ideas about the acceptability of those behaviours and then trying and continuing those behaviours that are reinforced. See K. O'Leary "Physical Aggression Between Spouses: A Social Learning Theory Perspective" in V. Van Hasselt, R. Morrison, and M. Hersen, eds., *Handbook of Family Violence* (New York: Plenum, 1988).

²⁹For example see J. Giles-Sims, *Wife Battering: A System Theory Approach* (New York: The Guilford Press, 1983), who studied the state of an emotional bond between the parties and the timing of the male's controlling behaviour. This study found some evidence to suggest that women were willing to accept the first act of violence as an anomaly and therefore forgive the behaviour, but that this response may actually reinforce the violent act.

³⁰Expectations about dating and intimate relationships are thought to be taught by culturally transmitted scripts. Scripts support violence when they promote males to feel superior and are entitled to be sexually aggressive as compared to female scripts that perceive females as being responsible for controlling the level of sexual involvement. See J. White and M. Koss "Adolescent Sexual Aggression within Heterosexual Relationships: Prevalence, Characteristics, and Causes" at 182 in H. Barbaree, W. Marshall and D. Laws eds., *The Juvenile Sex Offender* (New York: Guilford Press, 1993). Also, anthropologists have studied cultural differences in both the amount and acceptability of domestic violence within different societies. See D. Counts, J. Brown and J. Campbell, eds., *Sanctions and Sanctuary: Cultural Perspectives on the Beating of Wives* (Boulder Colo.: Westview Press, 1992).

³¹ Family influences have been examined by D. Farrington "Childhood Aggression and Adult Violence: Early Precursors and Later-life Outcomes" at 5 in D. Pepler and K. Rubin, eds., *The Development and Treatment of Childhood Aggression* (Hillsdale N.J.: Erlbaum, 1991). Religion effects have been studied by V. Whipple "Counseling Battered Women From Fundamentalist Churches" (1987), 13 *Journal of Marital and Family*

explanations, such as the biopsychosocial model that examines the relative contributions of three main predictors of violence, namely the physical, the social and certain psychiatric symptoms.³²

Thus, having outlined these various theories that have all attempted to explain the causes behind the controlling and abusive behaviours of male person directed at their female partners, one is able to see the many complexities connected to the issue. This information is an important part of the analysis section of the chapter as the effectiveness of two recent criminal justice's response is scrutinized.

(D) THE K COURT MODEL

In 1995, a number of Crowns in the Metropolitan Toronto area were becoming increasingly frustrated by the reality that far too many criminal assault charges alleging incidents of physical intra familial abuse were being withdrawn at the trial stage of the criminal justice system. The bulk of these charges were being withdrawn and not proceeded with primarily because the female complainants were unwilling to co-operate with the process. Basically, these type of charges were being investigated by the police as

Therapy 251. A. Dworkin in *Pornography: Men Possessing Women* (New York: NAL/Dutton, 1991) has suggested that pornography encourages the objectification of women and condones sexual aggression by men towards women.

³²P. McKenry, T. Julian, and S. Gavazzi "Toward a Biopsychosocial Model of Domestic Violence" (1995), 57 (May) *Journal of Marriage and Family* 307; as cited in the National Research Council, *supra* note 21.

most other front line investigations - without an appreciation for the nature and dynamics of the cycle of family violence. The officers would attend at the scene and attempt to gather information from the witnesses in attendance about what had transpired. Perhaps some additional background information was obtained, medical assistance provided and the victim services sector were contacted about either immediate or future shelter and assistance.

At approximately the same time that these shortcomings of the criminal justice system were being contemplated investigative reporters from the Toronto Star including Jane Armstrong, Caroline Mallon and Rita Daly were collecting data from all of the domestic assault charges laid and processed through the bail release program. They recorded all of the domestic assault charges processed by the Toronto Provincial Court for the week of July 30th 1995. They then monitored those charges through the criminal justice system for the next 18 months to determine how well the system performed. Their findings were shocking.

On March 9th, 1996 Jane Armstrong reported: "The Star study found a justice system failing at every step with judges, crown attorneys, defence lawyers and police pointing the finger of blame elsewhere."³³ In particular, their study discovered that by March 9th, 1996, only 60 percent of the 133 cases processed resulted in a conviction and that most of the charges were completed by way of a guilty plea to a lesser and included offence. The

³³J. Armstrong *et al.*, *The Toronto Star* (9 March 1996) A1.

reporters also discovered that 37 percent of the cases “fell apart because the victim either failed to show up in court or changed her story on the stand.”³⁴

During this time period the conventional approach to the prosecution of domestic assault was in place in the jurisdiction. As a result, a Crown proposal was implemented to improve the response. A specially designated spousal abuse court was established. This “K Court Model,”³⁵ entitled because of the court room in which it was assigned, was based on a co-ordinated effort that included a multi-professional commitment to reforming their individual interactions with the female complainants of domestic assault charges.

On the policing front, the investigative agencies were educated about some of the realities connected with patterns attached to the cyclical nature of domestic violence. They were trained to seek corroborating evidence at the scene, including such things as 911 emergency tapes, neighbours’ statements, scene and injury photographs and, perhaps most importantly, the video taped statement of the complainant (with her consent) as soon

³⁴*Ibid.*

³⁵It was fashioned on an American criminal justice response to domestic violence, operating in San Diego, California. It was reported that the American experiment, dedicated to a cooperative effort from all professional agencies involved in the investigation, prosecution and deterrence of this violent behaviour, recommended a zero tolerance policy towards domestic violence. In 1995 the program boasted a 95 percent guilty plea rate for the 2942 charges that were laid. As for the 58 matters that went to trial, the prosecution registered an 86 percent conviction rate. J. Armstrong et al., “Hitting Back in San Diego” *The Toronto Star* (March 16 1996) C1.

after the incident transpired as possible.

This was done so that a prosecutor could marshal an application before the trial court to allow the Crown to enter the videotaped statement to prove the truth of the contents of the statement made by the complainant. This “past recollection recorded” is an exception to the rule against the admissibility of hearsay evidence.³⁶ Therefore, if a complainant comes to court and testifies in a manner that is inconsistent with her original version of the events surrounding the allegations of domestic violence, that prior statement, if proved to have been made (hence the videotaping and search for corroborating evidence) could then be declared by the court to have some probative value.³⁷ The courts have consistently looked to a number of factors to assess the reliability of the previous statements. Some of these factors include a determination of whether the statement was made under oath or solemn affirmation following a warning that to mislead investigators is a serious matter, whether the entire statement is videotaped, and whether it was made at a time when the subject matter was sufficiently fresh in the mind of the complainant so as to ensure accuracy.³⁸ Also, while compiling the information to be attached to the bail briefs, the police made efforts to include prior occurrences summaries connected with police

³⁶For the general principles behind the exception see *R. v. B.(KG)* (1993), 79 CCC (3d) 257 (S.C.C.); *R. v. U.(F.J.)* (1995), 101 CCC (3d) 97 (S.C.C.).

³⁷*R. v. Beriault* (1997), 6 C.R. (5th) 382 at 386 (Que.C.A.) *R. v. Eisenhauer* (1998) 14 C.R. (5th) 35 (N.S.C.A.).

³⁸See *R. v. B.(KG)* *supra* note 36 and *R. v. Eisenhauer* *supra* note 37. These issues are more fully developed later in this chapter.

responses that did not result in criminal charges. This was done to get as complete a picture as possible prior to the trial date for the charges. This not only required a commitment of time and expertise from the police but also a commitment of financial resources as well.

On the probation services side of the equation, education and training was also implemented to assist in the reduction of specific recidivism. A treatment program based on education and counselling provided by accredited domestic violence professionals and accessed through probation services was established. Yet, these facilities could only be accessed once a determination of guilt was made by the court.

As well, the prosecutors charged with the responsibility of fairly presenting the evidence gathered, were also assigned to the specialized K Court to ensure that they had a clear understanding and appreciation of the rules and options available to the crown when confronted on the day of trial with a reluctant female complainant. This included an appreciation of recent developments in the law of evidence, particularly those related to hearsay and similar fact rules. This was particularly important given the fundamental changes to the principled approach taken by the Supreme Court in cases such as *R. v. Khan*, *R. v. KGB*³⁹ that allowed a prosecutor to advance the case involving a recanting witness beyond a declaration of adversity by the court and tender the evidence as

³⁹*R. v. Khan* (1990), 59 CCC (3d) 92 (S.C.C.); *R. v. B. (K.G.)* (1993), 79 CCC (3d) 257 (S.C.C.). These cases are described in further detail later in this chapter.

provided by the complainant soon after the incident as the truth of what in fact actually transpired.

The other response to the initiative included the establishment of a special court to process the charges. As the accused persons' bail hearings were completed, the cases were vetted by an assistant crown attorney to ensure that all domestic incident charges laid were earmarked for the K Court to be tried. These charges included not only allegations of domestic violence but also other criminal charges directly connected to a domestic setting, such as stalking, death threats, and break and enter charges. To be directed to the K Court the nature of the relationship between the parties had to include either a current or past marriage, common law relationship or a union that resulted in and shared a child. Both heterosexual and homosexual relationships were included.

Although the Ontario government is currently in the process of gathering statistical data to determine the effectiveness of the new K Court, one can certainly argue that the changes implemented have attempted to respond to the realities of the denial, fear and helplessness experienced by a woman trapped in the cycle of violence. As well, there are some early indications that this response is having some impact on the guilty plea rate for domestic offenders as the numbers have increased from 40 percent to 50 percent. This increase was marked within the first 6 months of the court's operation.⁴⁰ This is

⁴⁰M. Herman, Assistant Crown Attorney, Ministry of the Attorney General, Ontario and member of the domestic violence work team, telephone interview Wednesday April 28 1999. See also J. Armstrong *et al.*, "Guilty Pleas Up" *The Toronto Star* (11 December

significant for at least two reasons: one, a guilty plea prevents a victim from going through the ordeal of having to testify against her partner; and two, it saves the system resources that could be reinvested elsewhere. It has also been reported that within the same period of time, the conviction rate after trial for the K Court increased from 10 to 14 percent.⁴¹

(E) THE PLEA AND CONDITIONAL DISCHARGE COURT MODEL

A different response to the same frustrations connected with the prosecution of domestic violence cases emerged elsewhere in Ontario. The main concept behind this approach was to treat the male party's violent and abusive behaviour through a counselling and treatment program. The focus in this model is shifted away from the changes in the legal system that might be implemented to help ensure convictions and stressed an environment of co-operation between both the partners of a domestic relationship and the criminal justice system. Rather than being faced with the unco-operative recanting female witness at the time of the trial, assuming that she even showed up, an option would be provided to the first time accused male person involved in a matter alleging "minor" incidents of violence. In exchange for his admission of guilt and the completion of a court recognized treatment program, the male party would receive a conditional discharge from the court. To be accompanied with this counselling and education program for the male

1997) A1.

⁴¹Jane Armstrong, *supra* note 40.

party, support and assistance would be offered to the female partner and their children.

The aim of this model is the reduction of the behaviour that leads to domestic violence and thereby promote increased safety for the victims of domestic violence.

The first step in the program is to have a crown review the charges and the allegations supporting those charges. In determining eligibility, a number of factors are considered including:

1. The charge must be the accused's first for domestic violence.
2. That no significant harm has been suffered by the complainant by the accused's actions.
3. The accused's willingness to admit their assaultive behaviour towards the complainant.
4. The complainant's willingness to participate in the project.
5. The accused consents to allowing partner contact.⁴²

If eligible under these conditions, the matter is then directed to Victim Services staff who contact the female complainant to explain to her the goals and parameters of the program and then attempt to obtain her input into the process. If the accused is agreeable, he is advised of this option and he is processed through the special domestic assault plea court established to deal with the charges. Once the accused accepts these provisions he pleads guilty to the charges before a provincial court judge and his sentencing hearing is adjourned for 20 weeks. He then enters a counselling program⁴³ that consists of an initial

⁴²Notice to the profession, Re: Domestic Assault Project, Ontario Court, Provincial Division, Brampton Ontario.

⁴³*Ibid.* The three service providers for the Brampton Provincial Court are the Catholic Family Services of Peel Dufferin, Man to Man Program; The Salvation Army Domestic Violence Prevention Program and the Family Services of Peel. To be enrolled in the

assessment meeting, followed by 16 weekly group counselling sessions. In addition to these sessions focussed on the male batterer's behaviour, the agencies involved also contact the victim to determine her unique needs for safety and protection. Referrals may also be made for the female partner during this contact. If the accused successfully completes the intervention and counselling program then the crown's position on sentencing is a conditional discharge and probation with terms, including additional treatment if it is deemed appropriate.⁴⁴

(F) Analysis of These Two Criminal Justice Responses to Domestic Violence

Generally speaking, both of these models support the position that the criminal justice system has responded more positively to the crisis in our society related to domestic violence than it has to the issues connected to the disclosure of female sexual assault complainant's counselling records. The most significant factor behind this distinction is the system's attempt to not only understand the contextual background behind the abuse, including causes and consequences, but it has also moved forward at improving some of the inequities related to the conventional response to interpersonal violence. However, the two responses set out above, when examined carefully depict an oversimplified approach to the advancement of equal access to justice for the female victims of domestic violence.

counselling sessions the accused is expected to make a monetary contribution of up to \$350 to help defray the costs of the program.

⁴⁴*Ibid.* See also section 736 of the Criminal Code relating to the provisions of a discharge.

1. Practical Issues

One potential problem that may arise from the Plea Court model is where the male party initially agrees to the conditions of the plea, but after attending for the initial assessment and perhaps a number of the treatment or counselling sessions decides that he will not complete the program. When this occurs does the plea get struck because of a claimed fundamental disagreement as to the nature of the proceeding? The law grants to a trial judge the discretion to allow a change of plea from guilty to not guilty at any time before the conviction is entered and the sentence is passed.⁴⁵ However, this discretion should only be exercised when the accused has established that the plea was invalid because it was entered in error or under an improper inducement or threat.⁴⁶ Due to the fact that the guilty plea is entered in open court it is presumed to have been made voluntarily and therefore the onus is on the accused to establish that his plea is wrong.⁴⁷ This onus becomes even more difficult to overcome if the accused has had the assistance of legal counsel during the course of the guilty plea.⁴⁸ It has also been held that a change of plea will not be granted if it is established by the court that the accused understood the

⁴⁵*R. v. Bamsey*, [1960] S.C.R. 294, 125 C.C.C. 329; *R. v. Kavanagh* (1955), 114 C.C.C. 378 (Ont. C.A.).

⁴⁶*R. v. Rajaeefard* (1996), 104 C.C.C (3d) 225 (Ont. C.A.).

⁴⁷*R. v. Morris* (1994), 87 W.A.C. 296 (B.C.C.A.).

⁴⁸*R. v. Clermont* (1996), 150 N.S.R. 264 (N.S.C.A.).

consequences of his plea.⁴⁹ As a result, a guilty plea should not be struck even in a situation where the plea was motivated by an accused person's desire to receive a reduced sentence, such as a conditional discharge that is otherwise unavailable.⁵⁰

Thus, the jurisprudence supports the position that if an accused was represented by counsel and understood the consequences of his plea, then the trial court judge should not allow the plea to be struck. If the plea is not struck then the treatment option that the accused removed himself from, no longer exists and the court is left to the conventional sentencing tools, such as deterrence through punishment, whether it be monetary fines, incarceration or community service work. The violent behaviour goes untreated.

Yet even in the face of this legal jurisprudence, a trial judge does allow the plea to be struck down - and without a K Court prosecution model to fall back on - then the complainant and the community are funnelled back into an unsatisfactory conventional approach to the prosecution of the charges. There is no co-ordinated effort to ensure the unique issues of domestic assault offences, such as the recanting witness caught in the cycle of violence, are dealt with in their proper contextual nature. There are no responses to assist a female victim of abuse that wrongly believes that violence will come to an end without intervention. Therefore, assuming that this is the best that the criminal justice system has to offer, it is suggested here that the plea court model cannot exist without the

⁴⁹*R. v. Atlay* (1992), 70 C.C.C. (3d) 553 (B.C.C.A.).

⁵⁰*R. v. Burden* (1996), 90 O.A.C. 169 (Ont.C.A.).

availability or option of a multi component K Court model.⁵¹

2. Theoretical Issues

(i) Contextual Shortcomings

Regarding the K Court model, it is suggested here that an option for counselling, treatment and or education, coupled with a lenient sentence position such as a conditional discharge, in return for an early indicated guilty plea - within the same parameters of the plea court model - would also assist some female complainants access to justice. The complainants that such an option would assist are those that truly desire to continue the relationship, have only been exposed to a minimal amount of physical abuse and whose safety is not in issue.⁵²

More importantly, it stressed that “some” complainants may benefit from such an option. Many would not. This is the most significant component of this chapter’s criticism of the responses set out above, specifically that both of these responses have oversimplified the

⁵¹See the discussion related to the unified hybrid domestic assault court option discussed in the Reforms Chapter of the thesis.

⁵²See H. Johnson, “Seriousness, Type and Frequency of Violence” in *Wife Assault and the Criminal Justice System*, M. Valverde, L. MacLeod and K. Johnson eds., (Toronto: University of Toronto, 1995). This article reviews the 1993 Statistics Canada national survey on male violence against women. At page 136 she notes that this survey provides empirical evidence of an escalation in the severity of assaults over time.

causes and the consequences in their attempt to understand the complexities of domestic assault within its broader contextual societal framework. This position can be supported through a number of contentions.

First, neither the women whose safety is at risk given their exposure to more serious injury, nor those complainants who do not wish to reconcile the relationship would seem to benefit from such an approach.⁵³ Studies have shown that women are at the most serious risk of significant harm immediately after attempting to terminate an abusive relationship. Still, other potential partners and children of an abusive male may reap some benefits from a shift, or hopefully a cessation of violent behaviour, and therefore it is suggested here that any treatment is perhaps better than none at all, and that some attempts should be made to treat the underlying causes of the abusive behaviour. This treatment can, of course, take place without some of the other risks associated with this plea approach. The nature of the risks vary with the nature of the violent behaviour as well as to the number of individuals that are in harms way, but include further assaultive behaviour taking place in the home while the matters are still before the court.

Secondly, any improvements must take into consideration the needs and wishes of the complainant directly involved. This concept is complicated because the two considerations of “needs” and “wishes” are often mutually exclusive of each other. For

⁵³*Ibid.* at 136. Separated spouses tended to inflict more serious violence compared to abusive men in current relationships.

example, the theories reviewed above, including the cycle of violence that would predict that some women who request to have their abusive male partner's charges withdrawn do so because they are trapped in a state of learned helplessness, or at a minimum some form of unhealthy mental state of being if they are unable to safely extricate themselves and their children from a dangerously violent situation. These women may not appreciate their true long-term needs are inconsistent with their immediately perceived wishes. This is complicated by the fact that all women have a section 15 Charter right to be treated equally and fairly by the law. Therefore, serious efforts must be made to get the input from the specific complainant involved. However, it is argued that given the extremely high threat of harm, and the almost countless different theories related to the causes of domestic assault, that one telephone call from a minimally trained victim services worker is far from sufficient. There needs to be a detailed appreciation of the history behind the incident, including previous assaults, the number of children involved, prior treatment or counselling, any potential cultural variables, in addition to the gathering of a complainant's position on wishing to have further contact with her abusive partner. To gather such types of information would require not only a specially trained and skilled case worker, but also time so that a trusting relationship of some level could be created.

Thirdly, and directly related to the input of the complainant, it must be stressed that an "one size fits all" approach is wholly inappropriate in the circumstances of domestic assault. Some women may have actually only been abused on one single occasion and as a result wish for a conventional criminal justice response to an unprovoked assault on

their person. If this is the case, some assurances must be made that unwittingly an unequal lower tier of justice is not being created by these criminal justice responses. For example, S. Merry studied the legal consciousness of working class Americans and their experiences with both court and mediation processes in eastern Massachusetts in the early 1980's.⁵⁴ She found that the group that used the courts, both criminal and civil, was largely but not entirely women. Through her studies she discovered an interesting paradox connected to all users but especially women:

It empowers plaintiffs with relation to neighbors and relatives, but at the same time it subjects them to the control of the court. People who take their personal problems to court become more dependent on the state to manage their private lives...After submitting their problems to the courts for help, plaintiffs must then struggle to keep control of their problems as the courts reformulate and reinterpret these problems' meaning and consequences.⁵⁵

She found that the courts are accessed as a form of conflict resolution when all other means have failed. The court of last resort, if you will. Those seeking justice through the courts are otherwise powerless to resolve the conflict. Then when they attempt to exercise their rights before the law they discover that their voices are muted by the courts. Her studies found that while the plaintiffs were encouraged into the court they were denied a legal forum to assert their rights. On the issue of a separate tier of justice S. Merry wrote:

Thus, as these working-class court users seek to assert their sense of entitlement to legal relief for these problems, they find that it is denied by the courts. The court does not reject their requests out of hand but subjects

⁵⁴S. Merry, *Getting Justice and Getting Even* (Chicago: The University of Chicago Press, 1990).

⁵⁵*Ibid.* at 2. See also comments at 178 regarding women's particular response to the courts invitation for "personal" problem resolutions.

them to periods of monitoring, to probationary supervision, to social services. The problems are denied as legal cases but receive continuing supervision and management as moral or therapeutic problems. The plaintiffs do not find their rights protected, but they do receive lectures, advice about how to organize their lives, encouragement to come back for mediation, and promises that something will be done to the plaintiff if the problem recurs: the complaint will be issued, the problem will go back to court, perhaps the defendant will be fined or imprisoned.⁵⁶

She described this as a form of “cultural domination” as the courts exert their legal authority to frame the problems in other discourses, which thereby denies access to a justice system created to provide protection. Such diversions offer nonlegal, nonrights based solutions instead.

Some of these nonlegal solutions are examined more closely in Chapter Four that deals with potential reforms. Still, it is important here to note that if the criminal justice system is to provide access to justice for the victims of domestic assault, then the provision of that service will require a clear determination of what the complainant’s wishes are. It would be a further miscarriage of justice if a woman taking the position of a survivor, as described above, desiring that her rights and safety be protected by the courts through the prosecution of the criminal charges discovers, after the fact, that her partner’s charges have been rechannelled into a conditional discharge stream of consciousness. How one goes about discovering the wishes of the complainant may start with a phone call, but may very well require a much more contextual appreciation of the circumstances that brings those parties before the courts.

⁵⁶*Ibid.* at 180.

Moreover, this situation, as troublesome as it appears, is not as contentious as the possible scenario where a crown is required to protect the safety of the complainant as a member of the public, regardless of her clearly articulated wishes. This is described here as the ascertaining of the complainant's needs. How does one distinguish between the individual complainant trapped in a dangerous spiral of escalating violence from the woman who was hit once, immediately desired protection from her abusive partner, has since moved on and is no longer in any danger and no longer wishes to be involved in the prosecution of the matter? This is a complicated distinction that may need to be made from time to time that has no easy answers. It is postulated here that due to the very real potential for tragic consequences to transpire, it is better to err on the side of caution. As the statistics outlined in the first chapter indicate this is such a significant problem that once a thorough effort has been made by a skilled professional to ascertain the wishes and needs of both the complainant and the community, as well as the context of the allegations, someone must be allowed to exercise their discretion to ensure that the violence comes to an end.

(ii) The Consequences of Domestic Violence

An essential part of trying to decrease the amount of domestic violence in our community is understanding domestic violence within a contextual framework. As already pointed out these types of criminal offences are dramatically under reported. Therefore, it is postulated that a contextual understanding of the problem includes an appreciation not

only of the potential causes of the violent behaviour, but also the consequences of the abuse for both the direct victim as well as the community in which the victim lives. This information is required to properly assess the deterrence value of the modelled solutions described above. Without this broad appreciation any proposed solution is destined to fail if not in the short term, certainly in the long term.

The most obvious consequence to the direct victim is the physical injury. Depending on the severity of injury, physical pain and suffering may follow physical abuse. One study conducted a review of an urban American city's emergency room medical injuries records. They found that 50 percent of all of the injuries to women seen in the emergency room and 21 percent of the injuries that required emergency surgery were attributed incidents of domestic violence.⁵⁷

Also, most would anticipate the victim of physical abuse would additionally suffer psychological harm from the violent behaviour. Conditions such as depression, suicidal tendencies, low self esteem, shame, anxiety, alcohol and drug dependency problems, and post traumatic stress disorder have all been associated to the victims of both sexual assaults and domestic violence.⁵⁸ Still, while the notion of battered woman's syndrome is

⁵⁷E. Stark, A. Flitcraft, D. Zuckerman, A. Grey, J. Robinson, and W. Frazier, *Wife Abuse in the Medical Setting: An Introduction for Health Personnel* (1981), Domestic Violence Monograph Series, No. 7 (Rockville, Md.: National Clearinghouse on Domestic Violence, 1981) as cited by the National Research Council, *supra* note 21.

⁵⁸For an excellent review of the research and studies that have documented the psychological consequences of domestic violence see *Understanding Violence Against*

an accepted notion within legal proceedings it is not a recognized psychiatric syndrome. Rather, the term is linked to the consequences of having been abused. The use of the term has been the subject of much debate, primarily because it makes the consequences of domestic violence a pathology and disregards the many differences that exist between women's responses to being physically abused.⁵⁹

One level removed from the direct impact is for the children being raised in violent households. Many studies have been conducted on these subjects which have documented a broad range of effects, including being at a greater risk of physical injury than those children not subjected to the behaviour,⁶⁰ the exhibiting of high levels of aggressive, antisocial, fearful and inhibited behaviours,⁶¹ and the role modelling that young boys are involved in as they observe their fathers abuse their mothers.

Women, *supra* note 21 at 79 to 84.

⁵⁹See M. Dutton, "Understanding Women's Responses to Domestic Violence: A Redefinition of the Battered Wife Syndrome" (1993), 21 Hofstra Law Review 1191. This article provides a conceptual framework for examining the diversity of women's responses to violence within the context of the American criminal justice system

⁶⁰ M. Straus and R. Gelles, "How Violent Are American Families? Estimates from the National Family Violence Resurvey and Other Studies" in M. Straus and R. Gelles eds., *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (New Brunswick, N.J.: Transaction Publishers, 1990) as cited by the National Research Council, *supra* note 21.

⁶¹P. Jaffe, D. Wolf, S. Wilson, and L. Zak, "Similarities in Behaviour and Social Maladjustment Among Child Victims and Child Witnesses to Family Violence" (1986), 56 American Journal of Orthopsychiatry 142, as cited by the National Research Council, *supra* note 21.

Further impact is absorbed by community. Society on the whole must also deal with ramifications of domestic violence. For example, the fear of crime and of being victimized by crime effects people on the macro level, and because women fear crime more than their male counter parts, they are disproportionately affected.⁶² Also, there are financial costs of violence. H. Meyer has estimated that medical costs and lost work productivity attributable to incidents of domestic violence in the United States is in the range of \$5 to \$10 billion per annum.⁶³ This estimation has been supported by the American Bureau of National Affairs, whose findings are that the annual costs of domestic violence to employers for health care and lost productivity are between \$3 and \$5 billion per year.⁶⁴ There are also the costs of medical care (immediate and long term), the maintenance of homeless shelters and of course the costs to the criminal justice system, including the investigation, processing, prosecution and perhaps even incarceration costs.

Lastly, there are also less direct costs, such as changes in the quality of life for the battered partner and children that may be involved. One can only contemplate the costs associated with a battered women's reality of isolation, fear and lost opportunities to

⁶²M. Gorden and S. Riger *The Female Fear* (New York: The Free Press, 1989); I. Gomme "Fear of Crime Among Canadians: A Multivariate Analysis" (1986), 14 *Journal of Criminal Justice* 249, as cited by the National Research Council, *supra* note 21 at 87.

⁶³H. Meyer, "The Billion - Dollar Epidemic" (1992), *American Medical News*, January 6, as cited by the National Research Council, *supra* note 21 at 87.

⁶⁴The Bureau of National Affairs (1990), as cited by the National Research Council *supra* note 21 at 87.

enrich their own lives, forgone because of the controlling effects of violent physical abuse. An indication of these indirect costs can be found in a study conducted in New York that found that 56 percent of employed women who had been physically abused had lost their employment as a direct result of the abuse and 75 percent had been harassed by their male partner while in the work place.⁶⁵

(iii) Treatment as a Solution

Having considered this broad range of consequences attributable to domestic violence, one can begin to analyse the solution component - education, treatment and counselling - of the recent Ontario responses to domestic violence. The first thing that comes to mind is that, in their efforts to improve and overcome the shortcomings of the conventional treatment of incidents of female partner assaults, criminal justice policy makers have missed the issue of complexity and diversity in causes and consequences. Obviously not all women who have been physically assaulted by their male partners fall into identical backgrounds and histories of abuse. The causes vary and the costs to her, her family and society on the whole are all potentially very different. Also, if a goal of the criminal justice system is to prevent this specific male party from re-offending his treatment program will need to be modified for his particular needs.

⁶⁵L. Friedman and S. Couper, *The Costs of Domestic Violence: A Preliminary Investigation of the Financial Cost of Domestic Violence* (New York: Victim Services, 1987).

As one contemplates the value of the models one must consider whether either have had an impact at reducing domestic violence in the jurisdictions where they have been set up. The government of Ontario is currently in the process of collecting data to assess the impact of the programs, although unfortunately these results are not yet available. In addition to the input from both the victims and the offenders the state must be interested in the effect that such initiatives have on individual recidivism as well as the lowering of the prevalence of the behaviour throughout society. Moreover, there should be some consideration of how the models treat the broad social disabilities connected with domestic assaults. Since the results of the data gathered to date is unavailable one must consider some of the literature in the field that has assessed similar responses to domestic violence established in other jurisdictions. In doing this one may be able to predict the programs' effectiveness.

In a literature review conducted by Hamberger and Hastings, they concluded that court ordered treatment for wife batterers was an important positive step towards reducing domestic violence. On the concept generally they wrote:

When wife assault is called a crime, several forces come to bear. First the criminal justice system responds, as society's representative, to hold the wife assaulter unequivocally responsible for the violence. By mandating treatment for the offender, the criminal justice system and the treatment community are simultaneously giving him an opportunity to change and telling him that he is responsible for stopping his violence. Hence, there is good reason to coordinate criminal justice, social services, and treatment components to respond to partner violence.⁶⁶

⁶⁶L. Hamberger and J. Hastings, "Court Mandated Treatment of Men Who Assault Their Partner; Issues, Controversies, and Outcomes" in N. Hilton, ed., *Legal Responses to Wife*

They went on to examine the two primary types of court mandated treatment sessions for wife batterers. The first type is described as a pre-trial diversion or deferred prosecution plan wherein the male party has his arrest record cleared or the charge reduced in some fashion once he has successfully completed a court mandated treatment program. The second type is court ordered participation as part of a sentence imposed following a conviction.⁶⁷ The American studies that examined both of these formats were reviewed. To assess their impact two main areas of research have been conducted. The first involves the effectiveness of treatment sessions on the reduction of recidivism. The second is in the dissection of attrition rates and how well the criminal courts hold the abusers accountable when they drop out of the program they were ordered to attend in the first instance.

Another study completed by Hamberger and Hastings four years earlier discovered that the manner in which a male party was directed to the battering counselling had an effect on their program completion rate. They found that about two-thirds of the court mandated completed the sessions, as compared to two-fifths of the men whose treatment was not

Assault, Current Trends and Evaluation (Newbury Park: Sage Publications, Inc., 1993) at 188.

⁶⁷*Ibid.* at 190. A third type of court mandated treatment is also described that involves a municipal court order for minor ordinance violations that do not amount to a misdemeanour offence.

court ordered.⁶⁸ Others have studied the effect that the abuser's personal variables have had on the attrition rates connected to the treatment sessions. For example, it has been reported that younger, less educated and lower income level factors have all been linked to higher program drop out rates.⁶⁹

On the issue of recidivism, M. Steinman compared the number of domestic assault cases that occurred prior to the creation of coordinated community response with the cases that occurred post. This study found that without the coordinated effort the arrests actually increased the repeat violence. Yet the study also found that police arrests coupled with other criminal justice initiatives, including "an energetic prosecution of offenders and other interventions delivered by a coalition of public and private agencies," deterred additional violence.⁷⁰ Similarly, M. Syers and J. Edleson collected domestic assault data in Minneapolis over a 13 month period. Included in their research was direct input from the victims themselves. At the 12 month period they discovered the least amount of repeat violence for the men who were arrested and ordered to attend for treatment. At the other extreme, they found that the highest repeat violence occurred among men who were

⁶⁸L. Hamberger and J. Hastings, "Counseling Male Spouse Abusers: Characteristics of Treatment Completers and Dropouts" (1989) 4 *Violence and Victims* 323, as cited by the National Research Council, *supra* note 21 at 122.

⁶⁹R. Gruznski and T. Carillo, "Who Completes Batterer Treatment Groups? An Empirical Investigation" (1988), 3 *Journal of Family Violence* 141.

⁷⁰M. Steinman, "Lowering Recidivism Among Men Who Batter Women" (1990), 17 *Journal of Police Science and Administration* 124 at 124, as cited by the National Research Council, *supra* note 21.

not arrested.

However, such studies are frequently criticized. In their literature review, Hamberger and Hasting point out serious methodological flaws in most of the studies inducted in the field. At the completion of their work they conclude:

After reviewing much of the research literature, what do we ‘know’ about the short- [sic] and long term effects of treatment on wife assault? The answer, unfortunately, is ‘Not much.’ ... We cannot confidently say whether ‘Treatment works.’ We should be well beyond that question, asking instead, ‘What treatment works best on which types of client, and under what conditions?’⁷¹

Therefore, while the initiatives to treat and educate the abusive male partner are a progressive step in the right direction towards putting an end to domestic violence, it is far from certain as to whether what is currently being done is enough. It is suggested here that given the large number of variables that are linked to the causes and consequences of domestic assault more information is needed so that treatment can be geared to category types. Solutions to this complicated problem will require a significant contextual appreciation of the factors at the root of each case. Yet, this is not to suggest that each individual instance of domestic assault will require an independent exhaustive inquiry; rather, it is suggested that certain categories of offenders need to be recognized so that optimal treatment programs can be made be available to best take advantage of the opportunity to implement a lasting cure.

⁷¹*Supra* note 66 at 220. A discussion as to treatment types is set out in chapter four, that specifically deals with reforms.

3. Recent Canadian Judicial Interpretations Related to the Prosecutions of Domestic Assault Cases

The next step of this section is to examine the courts' response to this new initiative in prosecuting domestic assault cases. A recent search for cases that have dealt with the issue of a recanting domestic assault complainant's original statement admission into evidence for the truth of their contents has turned up very few cases. One case directly on point is reviewed below. This case provides us with a predictable issue that needs to be carefully examined. In this case the complainant provides the police and a number of third parties with an explanation about how she received her injuries. By the time the trial is commenced she recants this original version of events and provides the court with a second and inconsistent recollection of the incident. It is argued that it is an injustice for a court to merely assess that since there are now two inconsistent stories before the trier of fact, there is a reasonable doubt and an acquittal must be entered. To avoid this result, it is outlined in this section that the context of domestic violence must be considered by the courts. There must be fair determination of the facts from the evidence, including the two different version of events as provided by the complainant. It is argued that part of this consideration should be the assessment of all circumstances of reliability, including the complainant's original statements to the third parties. To fully appreciate the principles discussed, a brief review of the leading cases on hearsay has been included. Also, given the limited number of cases that deal with the issue, an effort has been made to discuss some of the legal principles that are evolving in the general area of hearsay evidence and

its admission into court under the exceptions of necessity and reliability. Also, one theme that is highlighted in this section is the distinctive rules that apply to an accused person as compared to the prosecution when it comes to the admission of hearsay evidence.

Specifically, we see that the courts have focused on the possibility of a miscarriage of justice that would flow from an innocent person being wrongly convicted rather than on the miscarriages of justice that may flow from a distraction by the courts from their search for the truth. This residual discretion connects back into the theme of conflicted interests, fairness and equality as developed in the Second Chapter, specifically the disclosure of a sexual assault complainant's therapeutic records.

(i) The Trilogy Plus One

In 1990 the Supreme Court of Canada took a bold step in the direction of hearsay reform. In *R. v. Khan*⁷² the accused, a physician, was charged with sexually assaulting a three and half year old child. Once the examination of the child was completed he was returned to his mother. At this time she noted a wet spot on his clothing that was analyzed and found to be a mixture of semen and saliva. Approximately 15 minutes after leaving the medical office the mother asked the child what he and the physician had spoken about. The child responded "He asked me if I wanted candy. I said yes ... He said 'open your mouth,' and

⁷²(1991), 59 C.C.C. (3d) 92 (S.C.C.). See also *R. v. L.T.W.* (1995), 131 Sask. Reports 47 (Sask. C.A.) at 49.

you know what? He put his birdie in my mouth, shook it and peed in my mouth.”⁷³ The boy was four and a half at the time of trial. At trial, an issue arose regarding the child’s ability to give unsworn testimony. The trial judge allowed the hearsay statement of the child that was made to his mother as described above under a strained “spontaneous statements”⁷⁴ exception. The Supreme Court of Canada dismissed the *Khan* appeal regardless of the declared error by creating a principled exception to the exclusionary rule related to hearsay. McLachlin J., writing for the Court held:

The hearsay rule has been traditionally regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.⁷⁵

The Court went on to anchor the new approach in two general requirements: necessity and reliability. For interpretive purposes, necessity was broadly described as “reasonably necessary.”⁷⁶ Examples of circumstances that would meet this requirement threshold included the inadmissibility of a child’s evidence or perhaps the trauma that would be caused to a child if required to testify in court. Regarding reliability, McLachlin J. provided a number of considerations that could be relevant, but clearly designated the

⁷³*Ibid.* at 95.

⁷⁴*Ibid.* at 96.

⁷⁵*Ibid.* at 100.

⁷⁶*Ibid.* at 104.

trial judge as the person to best frame the factors.⁷⁷

In *R. v. Smith*⁷⁸ the Supreme Court of Canada had an opportunity to re-examine the principled approach to the hearsay issue. In this case the accused was charged with second degree murder. The Crown wished to tender the statements of the deceased to support its theory that the accused had initially tried to persuade the deceased to smuggle drugs into Canada from the United States. When she refused he left her in a hotel in the United States. The deceased then made series of phone calls to her mother; one indicating that she had been abandoned by the accused and that she required a ride home, a second indicating that he had still not returned, a third indicating that the accused had returned to the hotel and that she would no longer require a ride, and a fourth call indicating that she was on her way home. The main issue on appeal was the admissibility of the statements made by the deceased to her mother over the phone. The Court held the first two calls should be admitted but excluded the third due to its lack of reliability. The fourth call was not in issue. Lamer C.J.C., on behalf the Court, supported the reforms established in *Khan*, stating that:

However, *Khan* should not be understood as turning on its particular facts, but, instead must be seen as a particular expression of the fundamental principles that underline the hearsay rule and the exceptions to it. What is important, in my view, is the departure signalled in *Khan* from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike. The movement

⁷⁷*Ibid.* at 105.

⁷⁸(1992), 75 C.C.C. (3d) 257 (S.C.C.).

towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination.⁷⁹

In *R. v. B.(K.G.)*⁸⁰ this principled approach was expanded to admit into evidence a prior inconsistent out of court videotaped statement for the truth of its content. In this case a young offender was charged and tried in the youth court for second degree murder. The incident arose when the accused and three other young men became involved in a physical altercation in which the deceased was stabbed and killed. Two weeks after the killing the three other young men were interviewed separately by the police. During these interviews each had present with them a parent and legal counsel. With their consent the interviews were videotaped. In statements each of them indicated that the accused had admitted to them that he believed that he had stabbed the deceased. During the trial each of the three companions refused to adopt their earlier videotaped statements. Under section 9 of the *Canada Evidence Act*, each was cross-examined and admitted that they made the statements but also gave evidence that they had lied to the police. The trial judge held that the earlier videotaped statements could only be used to assess their overall credibility. The accused was acquitted. The Supreme Court of Canada overturned the lower court ruling on this issue and ordered a new trial.

Lamer C.J.C., again writing for the majority, rejected the technical rule of exclusion and

⁷⁹*Ibid.* at 270.

⁸⁰(1993), 79 C.C.C. (3d) 257 (S.C.C.).

found that where there was a sufficient guarantee of reliability attached to a statement, then the prior inconsistent statement should be admissible for its truth. On the issue of reliability he held:

The reliability of prior inconsistent statements is clearly a key concern for law reformers and courts which have reformed the orthodox rule, and, as I have outlined, this concern is centred on the hearsay dangers: the absence of an oath, presence, and contemporaneous cross-examination. The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account of the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony at trial, and so additional *indicia* and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.⁸¹

This notion of a threshold reliability was addressed in *R. v. U.(F.J.)*.⁸² This case involved a recanting child witness. The accused was charged with five counts of incest and the sexual touching of his daughter. The young complainant was interviewed by the police and provided them with a statement detailing the sexual attacks. The sexual acts were described in some detail and with a recollection regarding frequency. Following this the accused was interviewed by the police. During this interview the accused provided the police with an admission regarding the manner and frequency of the offences. The accused's statement was ruled admissible at trial. When called to testify the complainant recanted the allegations, indicating that she had lied to the police. The trial judge directed

⁸¹*Ibid.* at 287. See also *R. v. Finta* (1994), 88 C.C.C. (3d) 417 (S.C.C.) at 526 for a discussion regarding reliability as established by a combination of several factors.

⁸²(1996), 101 C.C.C. (3d) 97 (S.C.C.).

the jury that they could examine the complainant's prior statements and compare it to the accused's confession as the similarity in details could be considered in their deliberations. The accused was found guilty. A number of issues, including the burden of proof and the proper use that could be made of the prior inconsistent out of court statements were examined by the Supreme Court.

Regarding the procedural issue of burden of proof, Lamer C.J.C. held that:

the trial judge need only be convinced on a balance of probabilities that the statement is likely to be reliable, as this is the normal burden of proof resting upon a party seeking to admit evidence.⁸³

Related to the statements use issue, once again the Court relied on a flexible and principled approach to "ensure that the new developments in the evidential treatment of hearsay would reflect those tenets"⁸⁴ as was articulated in the cases *Khan* and *Smith*. Here the Court held that this was a proper case that the orthodox rule, that a prior inconsistent statement cannot be admitted for its truth, should not be applied. Lamer C.J.C. writing for the majority, considered the similarity between the statements of the complainant and her father to support the requisite reliability. He noted that:

In order to eliminate, or at least substantially reduce, the likelihood of a similarity

⁸³*Ibid.* at 119. See also D. Paciocco and L. Stuesser, *The Law of Evidence* (Concord, Ont.: Irwin Law, 1996) at 13; "the general rule is that the party seeking to have a rule of evidence applied must establish its factual prerequisites on a balance of probabilities. This means that while a rule of exclusion or a special rule of admissibility provides a list of preconditions, the judge must determine that each is met before the rule can operate."

⁸⁴*Ibid.* at 108.

between two statements arising through coincidence, the similar factual assertion must be so striking that it is highly unlikely two people would have independently fabricated it. ... In some cases, the necessary degree of similarity will result from the unique nature of particular factual assertions in both statements. In other situations, while there may not be any points of similarity that are sufficiently striking to render coincidence unlikely when viewed standing alone, it may be that the cumulative combination of similar points renders the overall similarity between the two statements sufficiently distinctive to reject coincidence as a likely explanation.⁸⁵

Having completed this brief review of the Supreme Court's reformed position on the principles of hearsay, we can now turn our attention to its actual and potential impact on the prosecution of domestic assault cases.

(ii) Domestic Assault Cases

In *R. v. Mohamed*⁸⁶ the Crown applied to have the complainant's prior inconsistent statement admitted into evidence for the truth of its contents. In this case the complainant and the accused were married in 1989. On September 14, 1996 the accused assaulted the complainant following an argument. Afterwards the accused left the apartment to purchase some cigarettes. While he was gone from the apartment the complainant locked the apartment door. When her husband returned he became upset and kicked the door open and entered the apartment. He found the complainant in the kitchen preparing a

⁸⁵*Ibid.* at 117. Similarities between the statements is considered in addition to the factors set out in *R. v. B.(K.G.)*, including the availability of the witness to be cross-examined at trial, the use of an oath given at the time the out of court statement was made, and whether or not the statement was videotaped.

⁸⁶[1997] O.J. No. 1287 (Ont. Prov. Div.).

meal for their children. At this time there were two pots on the stove, one a boiling pot of macaroni and the other a boiling pot of tomato sauce. The accused, angry at being locked out of the apartment, picked up the boiling pot of macaroni and poured it on the complainant's head. She ran from the kitchen and the accused followed her with the boiling pot of tomato sauce. The accused then intentionally poured the molten liquid over the complainant's head. This caused serious second degree burns to her back and chest. She eventually ran out of the apartment where she was assisted by neighbours. An emergency "911 call" was made and she was transported and admitted into a local burn unit for treatment.

Within the two hours following the attack the complainant spoke to the neighbours who assisted her, the 911 operator, the ambulance attendants, a police officer present in the emergency ward at the hospital and to the plastic surgeon who took the information from her about her injuries. The complainant told each of these parties a similar account of the assaults as set out above. Three days later, Detective Gerry attended at the burn unit to take a statement from the complainant. The interview was audio taped. At that time she also advised the detective that the injuries that she had suffered had been caused by her husband in the manner set out above. Further, she advised the detective that she had been physically assaulted by her husband in 1993 when he punched and choked her with an unknown type of cord.

The next contact that transpired between the detective and the complainant was on

November 13, 1996. At that time the detective became aware that the complainant was now recanting her earlier version of events. From that point in time forward she indicated her wish not to have anything else to do with either the police or the prosecutor's office. She even refused to answer the door to receive her *subpoena* to attend court. Months later at the trial she was called by the Crown to testify on the matter. At that time she indicated, under oath, that she had assaulted him earlier in the day and that she poured the boiling macaroni pot on him. She also testified that the boiling pot of tomato sauce was spilled on her accidentally.

In a conventional manner the prosecutor made a section 9(2) Canada Evidence Act application to determine the issue of adversity so that the witness could be cross examined. During her cross examination the complainant failed to adopt any of her previous statements as true, maintaining that she had falsely accused her husband of the violence. In an unconventional manner the Crown then applied to have the complainant's previous statement admitted for the truth as to what had happened on September 14, 1996. The Court granted the application and allowed the prior statements to be admitted into evidence for the truth of their contents.

MacDonnell Prov. J., reviewed the principles set out by the Supreme Court of Canada in the decisions discussed above.⁸⁷ Given the recantation of the complainant the component

⁸⁷*R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257; *R. v. U.(F.J.)* (1995), 101 C.C.C. (3d) 97; *R. v. Khan* [1990] 2 S.C.R. 531, 59 C.C.C. 92, and *R. v. Smith* [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257.

of necessity was conceded.⁸⁸ As a result, the judge's reasoning focussed on the reliability requirements of the issue. He noted the three main concerns at the root of the traditional distrust of prior inconsistent statements included:

1) the absence of an oath or solemn affirmation; 2) the inability to assess the demeanour of the declarant at the time the statement was made; 3) the lack of opportunity for the party against whom the statement is offered to cross-examine the declarant at the time the statement was made.⁸⁹

The court went on to consider a number of safeguards that could be flexibly considered when assessing the reliability of the statements in issue, including the videotaping of the statement.⁹⁰ Still, probably the most interesting feature of these types of cases is what the courts do when the statements are not videotaped following an oath or affirmation accompanied by a warning about the consequences of intentionally misleading the police. In the *Mohamed* case, MacDonnell Prov. J. relied on other circumstantial guarantees of reliability that consider the frailties of reliability in hearsay evidence. For example, the availability of the witness for cross examination by the opposing party was held to be a

⁸⁸See also *R. v. Conway and Husband* (1998), 121 C.C.C. (3d) 397 (Ont.C.A.) at 406; *R. v. U.(F.J.)* (1995), 101 C.C.C (3d) 97 (S.C.C.) at 119. The criteria for necessity is met whenever a witness recants. For a broader review of necessity see R. Pomerance, "Confronting the Hearsay Dangers: The Principles of Necessity and Reliability" [unreported] a paper presented at the National Criminal Law Program, Dalhousie University, Halifax Nova Scotia, July 1997. But see *R. v. Charles* (1997), 152 Sask. Reports 65 (Sask. C.A.) at 75.

⁸⁹*R. v. Mohamed*, *supra* note 86 at 3.

⁹⁰Still, it should be clarified that an oath, a caution as to the significance of providing false information and the videotaping of the statement are not preconditions to the admissibility of a prior statement. *R. v. U.(F.J.)*, *supra* note 82.

substantial means to ensuring reliability.⁹¹

Furthermore, the Court determined the option of relying on other alternative guarantees of trustworthiness. MacDonnell Prov. J. considered the principles articulated in the case of *U.(F.J.)* and held:

I regard *U.(F.J.)* as a case that turned very much on its own facts, but in any event it is note worthy that in that case the Supreme Court found a circumstantial guarantee of reliability not in the fact that the accused's statement tended to confirm the prior statement of the complainant but rather in the fact that the accounts were strikingly similar.⁹²

The Provincial Court stressed the difference between threshold reliability and ultimate reliability. It was pointed out that the judicial inquiry regarding the element of reliability needs to be focussed on the circumstances in which the statement was made.⁹³ It was reasoned that if the circumstances in which the statement are made eliminate the possibility that the person making the statement was either untruthful or mistaken then evidence can be assessed as reliable. Although it is not specifically articulated in the decision, it is then assumed that other factors, beyond the those circumstances of the making of the statement, are relied upon to determine ultimate reliability. So for example, in the case of *Mohamed* the photographs and medical expert descriptions of the burn injuries could only be considered in the determination of ultimate reliability and not in the

⁹¹*R. v. B.(K.G.) supra* note 87 at 116.

⁹²*R. v. Mohamed, supra* note 86 at 5.

⁹³See also *R. v. Hawkins and Morin* (1996), 111 C.C.C. (3d) 129 (S.C.C.) at 129 and *R. v. Smith, supra* note 87 at 270.

assessment process that concludes whether or not the hearsay statements, specifically about how the injuries occurred, are in and of themselves reliable. It is argued here that this is perhaps a false distinction yet one that the courts adhere to. Having spent eight years in the criminal justice system's trial courts (the trenches so to speak) it is suggested that to rely exclusively on the sanctity of an oath and to neglect other circumstantial pieces of evidence, such as the testimony of other unbiased third parties, to determine the reliability of a prior out of court statement is naively ridiculous.⁹⁴

MacDonnell Prov. J. applied the facts of this case to the three contentious reliability issues as established in *R. v. B. (K.G.)*. First with regards to the absence of an oath at the time the statements were made to the detective in the hospital, the Court considered the serious nature of the manner in which the interview took place in the burn unit. The fact that the detective spoke with the complainant about the accused's bail conditions and the possibility for the increasing of security at the hospital, the fact that the detective "had with him a large attache case containing tape recording equipment" and the fact that "he pinned a microphone to her clothing and to himself all satisfied the issue of the absence of the oath."⁹⁵

⁹⁴See L. Stuesser, "Admitting Prior Inconsistent Statements where 'Adverse' - Section 24, Evidence Act (Ont.)" (1962), 40 Can. Bar. Rev. 96; and D. Dugdale, "Against Oath Taking" [1985] N.Z.L.J. 404, both as cited by Lamer C.J.C. in *R. v. B. (K.G.)*. These articles suggest that in a modern society the power of an oath should be discounted as a means of guaranteeing witness reliability.

⁹⁵*R. v. Mohamed*, *supra* note 86 at 6.

Second, on the issue of the statement not being videotaped, the trial judge relied significantly on the circumstances surround the audio taping of the statement. This combined with the Court's opportunity to observe the witness take the stand during the *voir dire* conducted at the trial compensated for the inability of the trial judge to be present during the time that the statement was made in the burn unit.

Third, the fact that the complainant remained available for cross examination for the remainder of the trial, if the previous statement was admitted for the truth of its contents, overcame the lack of contemporaneous cross examination when the statement was made at the burn unit.⁹⁶

The Court concluded that the Crown had established the requisite threshold reliability of the complainant's statement made to the detective in the burn unit. As such, the statement was admitted for the truth of its contents, namely that her husband had intentionally poured boiling hot liquids onto her body.

Given the realities of the special dynamics between an accused and a complainant in cases involving domestic assault cases, it is suggested that most would agree with the result of allowing the Court to consider the statement that the victim made to the detective while in the burn unit for the truth of its contents - that the accused intentionally

⁹⁶*R. v. B. (K.G.) supra* note 87, where it was held that the opportunity to cross examine the party making the statement at trial could be an important substitute for the inability of the defence to cross examine the witness at the time that statement was made.

poured the boiling hot liquids on his wife. Still, what about the other evidence gathered by the police from the neighbour, the 911 tape, the ambulance attendants, the police at the emergency ward, and the plastic surgeon? They all spoke with the complainant and all were advised that the accused had intentionally burned her with the boiling liquids after having had an argument. Is this type of information not also relevant in creating the context in which the statement was made? Does it not add reliability to the complainant's statement made to the police while in the hospital? It is suggested that the answer to both of these questions is obviously yes. However, given the developing hearsay jurisprudence, the Court could not look to these factors to support the threshold reliability of the truthfulness or accuracy of the audio taped hearsay statement. Unfortunately, the Court's eventual determination was not reported, so we are unable to determine whether this information could be, or was, relied upon in the final determination of ultimate reliability. All that we do know is that it was information that was excluded from the statement's initial threshold reliability determination.⁹⁷

Another troubling feature about this case are the questions that arises in the hypothetical: what if the complainant had never made the statement to the police while in the hospital?

⁹⁷It is noted that the distinction between "threshold" reliability and "ultimate" reliability may require further clarification. It has been assumed for the purposes of this work that threshold reliability relates to the question of satisfying a minimum standard of trustworthiness such that the evidence can be considered by a trier of fact. Once the evidence is admitted for such a purpose the trier of fact must then assess the same evidence for a final determination of cogency. D. Paciocco and L. Stuesser in *The Law of Evidence* (Concord, Ont.: Irwin Law, 1996) examines a similar distinction between primary materiality and secondary materiality. These issues are discussed more fully over the next few pages of this chapter.

What if she had died in a time frame beyond the scope of a dying declaration exception⁹⁸ or was consistently unco-operative with the police? Could the statements that she made to the neighbours and other third parties be admitted into evidence for the truth of their content? From the Court's determination of the issue we are given some guidance about the use that can be made of the complainant's initial audio taped statement that she gave to the police in the hospital. The case also examines the use that can be made of the complainant's statements to the third parties that she had contact with shortly after the incident, particularly as they relate to the issue of reliability regarding the complainant's statement to the police. It is argued that while MacDonnell Prov. J.'s decision in *Mohamed* was perhaps correct in law (as is reviewed below) his reasoning would not assist a court presented with this hypothetical situation. Therefore, it is postulated that the statements made by the complainant to the other third parties, assuming they can overcome the preliminary issue of threshold reliability, established on a balance of probabilities, they should also be ruled as admissible in the fact finding mission of a trial.

This position is supported by both the reasons articulated by the Supreme Court of Canada related to the flexibility and the need for a principled approach to assessing the admission of hearsay evidence for the truth of its contents, as well as some of the basic rules of evidence. Because the Court's rulings have already been examined, the next

⁹⁸D. Watt, *Watt's Manual of Criminal Evidence* (Scarborough, Ont.: Carswell, 1999) at 273; "a statement made by a deceased declarant under a settled hopeless expectation of death concerning the circumstances of the impending death, including its cause and the identity of its perpetrator, is admissible to prove the truth of the facts contained in the statement." See also *R. v. Woods* (1897), 2 C.C.C. 159 (B.C.C.A.).

component of this chapter, reviews some basic first principles of the rules of evidence.

The basic rule of evidence is that all relevant and material evidence is admissible.

Generally speaking an item of evidence is relevant if it makes a matter in issue more likely than not. D. Paciocco and L. Struesser note that evidence has been recognized as relevant if it “has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of the that evidence.”⁹⁹ The determination of whether or not an item of evidence is material is somewhat more complicated, because there are two related groupings of materiality. To assess materiality one must start with the development of an issue. Primary materiality is determined by the pleadings, indictment or information of a case, the substantive law and by procedural rules. Secondary materiality is determined by a court charged with the responsibility of resolving questions about the admissibility of evidence and witnesses’ testimony. This involves an assessment of whether, and to what level, the information that has been presented to the court is accurate or honest. This process is described as the determination of credibility and weight. On the issue D.

Paciocco and L. Steusser write:

In order to decide the value of the evidence offered in a case, the fact finder may profit, therefore, from information that is not directly about the facts in issue but rather about the witness or the evidence that is being presented. For example, proof that a witness received a bribe from a party is important in assessing the testimony of that witness. Evidence offered to demonstrate the value of other

⁹⁹D. Paciocco and L. Steusser *The Law of Evidence* (Concord, Ont.: Irwin Law, 1996) at 19. Compare this explanation with Lamer C.J.C.’s position regarding threshold and ultimate reliability in *R. v. U.(F.J.)*, *supra* note 82 at 119.

evidence can be material, even though it is not about one of the primary issues requiring resolution. It is secondarily material, since it assists only indirectly in resolving the primarily material issues that the court must decide.¹⁰⁰

Therefore, the Supreme Court has established a policy of a flexible and principled approach for trial courts to deal with the admission of hearsay evidence. Basic evidence rules suggest that the statements made by the complainant in the *Mohamed* Case are relevant because they make the accused's guilt, or at least the manner in which the injuries occurred, more likely than not. The evidence of what the complainant told her neighbour and the other third parties about the incident are obviously material, but excluded by the traditional rule against admission of hearsay evidence for the truth of its content. However a flexible and principled exception exists to include this evidence in the fact finding mission as long as the evidence can meet the requirements of necessity and reliability. The necessity is obvious assuming the complainant refuses to testify. The reliability of the statements must then be examined by a court. It is suggested that in addition to circumstances under which the statement was taken, these other items of evidence should also be considered as secondarily material that could be used by the court to assess the value of the complainant's statement.

Having established this position we can now review some of the jurisprudence in the area to determine whether or not this position might be supported. As indicated earlier the rationale articulated in *Mohamed* is consistent with the conventional jurisprudence. For

¹⁰⁰*Ibid.* at 18.

example, in *R v. Conway and Husband*,¹⁰¹ the Ontario Court of Appeal assessed the issue, although outside of the realm of domestic assault. In this case the two accused were charged with second degree murder. They admitted to manslaughter but not to the charge as laid. The Crown's entire case for second degree murder was based on a statement that a witness, Marc Jardine, made to the police during the course of their investigation. At the time of the trial the witness was unable to recall the statement nor could he recall even making the statement to the police during the investigation. The Court was not satisfied that the previous statement was reliable for a number of reasons including, the lack of an oath given to the witness at the time the statement was made, the statement was not videotaped and the cross examination of the witness at court was ineffectual because he claimed that he could not even recall making the statement. More interesting for our purposes, was the Court's ruling on the Crown's argument that the Court should have the ability to look to other factors outside of the circumstances under which the statement was made, such as other evidence gathered by the police, that confirmed the accuracy and reliability of the witness's statement.

Regarding the issue of reliability, Labrosse J.A. writing for the Court relied on Chief Justice Lamer's words set out in *R. v. Smith*.¹⁰² He noted that:

The criterion of 'reliability' - or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness - is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of

¹⁰¹(1998), 121 C.C.C (3d) 397 (Ont.C.A.).

¹⁰²(1992), 75 C.C.C. (3d) 257 (S.C.C.) at 270.

hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be 'reliable', i.e., a circumstantial guarantee of trustworthiness is established.¹⁰³

The Court rejected the position of the Crown that other corroborating evidence, apart from the circumstances in which the statement were made, should be assessed to determine the admissibility of the hearsay statement.¹⁰⁴ Part of the Court's rationale for this determination was that none of the alleged confirmatory evidence referred to by the Crown was tendered before the trial judge during the *voir dire*. As a result, the trial judge could only consider the evidence presented in the *voir dire* to make a threshold determination of reliability of the statement in question. Related to this issue Labrosse J.A. contemplated the rights of an accused and noted that the "*voir dire* can have an impact on the way the trial unfolds, notably, on the strategy adopted by the defence."¹⁰⁵

Similar exclusive reliance on the circumstances surrounding the making of a statement

¹⁰³ *R. v. Conway and Husband*, *supra* 101 at 414.

¹⁰⁴ *Ibid.* at 416. To support this position the Crown relied on the minority decision of the United States Supreme Court in *Idaho v. Wright*, 110 S.Ct. 3139 (1990). This case involved the statements of a child witness unavailable to testify in a trial involving allegations of sexual abuse. In this case the majority held that the circumstances relevant to the admissibility of the statements only include those that surround the making of the statement. Labrosse J.A. noted that the majority's view was consistent with the principles articulated in *R. v. B.(K.G.)*, *supra* note 87. But see *R. v. Big Eagle* (1997), 163 Sask. Reports 3 (Sask. C.A.) at 17, wherein Tallis J.A. relies on the evidence of independent witnesses as a substitute for videotaped demeanour evidence. The Court also considered the similarity of content between two statements to help assess the issue of reliability.

¹⁰⁵ *Ibid.* at 416.

were pronounced in *R. v. Tat and Long*.¹⁰⁶ In this case the accused were charged with one count of first degree murder and two counts of attempted murder connected with a shooting at a restaurant. The Crown wished to tender the identification evidence of an eye witness who shortly after the incident picked out Long as one of the gunmen. When called at trial the witness maintained that neither accused were the shooters. At trial, the evidence of the police, specifically the witness's statements related to the evidence of identification was admitted for the truth of its content and both accused were convicted. The Ontario Court of Appeal excluded the evidence and entered acquittals for both accused. On the issue of reliability and the out of court statements, Doherty J.A. writing for the Court adopted the reasoning of Lamer C.J.C. and Iacobucci J. as set out in *R. v. Hawkins*,¹⁰⁷ wherein it was held that:

The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited in to determining whether the particular hearsay statement exhibits sufficient *indicia* of reliability so as to afford the trier of fact a satisfactory basis for the evaluating the truth of the statement. *More specifically, the judge must identify the specific dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offers sufficient circumstantial guarantees of trustworthiness to compensate for those dangers.* [Emphasis added by Doherty J.A.]¹⁰⁸

Applying this principle to the facts in issue the Court held that there were only two circumstances that could compensate for the inherent dangers connected to the hearsay evidence. These included the fact that the statement was made soon after the event

¹⁰⁶(1997), 117 C.C.C. (3d) 481 (Ont. C.A.).

¹⁰⁷(1996), 111 C.C.C. (3d) 129 (S.C.C.) at 157.

¹⁰⁸*Supra* note 106 at 510.

described and that the witness had no personal interest in making the identification.

However, these circumstances failed to persuade the Court that the statement should be admitted for the truth of its content, particularly due to the fact that it was not videotaped and because the defence could not cross-examine the witness alleged to have made the statement.

In *R. v. McMaster*¹⁰⁹ the issue was revisited. In this case the accused was charged with murdering his girlfriend. The accused's position was that he was innocent and that a third party was responsible for the death. The defence wished to call a witness, identified in the judgement only as Reilly, to testify about a conversation that this witness had with the deceased about her concerns that she had about the third party in question. The trial judge excluded the hearsay evidence because it was found to be unreliable. The Court of Appeal upheld the determination and commented on the issue of the consideration of evidence tendered outside of the admissibility *voir dire*. Brook J.A., writing for the majority, held that:

He considered, and said so, that Reilly was not a reliable witness. I think it is clear that this threshold issue of reliability is to be decided on the evidence heard on the *voir dire*, without reference to any of the evidence heard on the trial outside of the *voir dire*.¹¹⁰

This case is unique from the other cases reviewed to this point because it represents a defence application to admit hearsay evidence for the truth of its contents. It seems to

¹⁰⁹(1998), 122 C.C.C. (3d) 371 (Ont. C.A.).

¹¹⁰*Ibid.* at 374. See also *R. v. Erven*, [1979] 1 S.C.R. 926; 44 C.C.C. (3d) 257.

apply the same principles to this defence application that have been applied to the Crown utilizations already discussed. However, two other recent decisions in the field of exceptions to the hearsay rules would seem to suggest that an additional consideration, specifically a “residual discretion,” may affect defence concerns about this type of evidence. This distinct rule may impact on trial fairness and the equality principles outlined above.

*R. v. Kalisa*¹¹¹ discussed the weighing of the probative value against its potential prejudicial effect for the accused in relation to the trial judge’s determination of the reliability of hearsay evidence. In this case the accused was charged with a number of sexual offences involving a minor female complainant. At trial she refused to testify. The Crown attempted to have the sister of the complainant, who received a statement from the complainant about the incident and also acted as an interpreter for her sister as she discussed the incident with the police, a doctor and a psychologist. During the *voir dire* held to determine the admissibility of the hearsay statements, the sister witness declared that she had since had further discussions with her sister the complainant and that her sister now indicated that the accused had done nothing wrong. Furthermore, this witness indicated that she would not testify about the details of the post incident discussions that she had with her sister. The trial judge held that the evidence of the sister witness that she originally provided to the investigators was not sufficiently reliable and excluded the evidence. The accused was acquitted and the Crown appealed. The Quebec Court of

¹¹¹(1999), 130 C.C.C. (3d) 121 (Que. C.A.).

Appeal dismissed the appeal. In its support for the trial judge's determination they held:

The Court is of the view that in the determination of the reliability of the hearsay evidence, it was effectively part of the trial judge's role, apart from assessing credibility *per se*, to determine whether the prejudice which may be caused to the accused substantially outweighed the probative value of the evidence, which was incomplete and weak, to the point of risking making the trial unfair for the accused, contrary to the *Canadian Charter of Rights and Freedoms*.¹¹²

Another case that would appear to support a residual discretion for trial judges is *R. v. Folland*.¹¹³ In this case the accused was charged with sexual assault. The defence position was mistaken identity. The allegations suggested that after an evening of drinking the complainant went to bed alone. She awoke to find a man having sexual intercourse with her, obviously without her consent. She identified the accused as the person responsible, in part, because of perception that her attacker was partially bald. The accused's position was that after the sexual assault had occurred a third party, Mr. Harris, admitted to having sexually assaulted the complainant. The police also tested semen found in the complainant's underwear and in a pair of men's underwear found in the bed where the complainant was sleeping. The DNA test performed excluded the accused as a source of the semen. Regardless of this the accused was convicted after trial. After the trial, bodily samples were obtained from the third party and tested. DNA tests performed on these samples determined that the third party was the source of the semen located in the

¹¹²*Ibid.* at 126. No indication was made in the reported decision as to which judge wrote the decision. The panel included Brossard, Rousseau-Houle and Delisle J.J.A. No reference was made to the specific section of the *Charter* under which the potential unfairness could be created. See also D. Paciocco and L. Steusser, *supra* note 99 at 23 for a review of the exclusionary discretion rule.

¹¹³(1999), 132 C.C.C. (3d) 14 (Ont. C.A.).

underwear in question. The central issue of this case was the fresh evidence gathered and the results from the DNA tests. The Court of Appeal allowed the appeal and ordered a new trial. On the issue of admitting the hearsay evidence from the accused about what Mr. Harris had said to him about being responsible for the attack, the Court suggested that a residual discretion with the trial judge existed to relax the rules of evidence to prevent a miscarriage of justice. Rosenberg J.A. reviewed the evidence of Mr. Harris given at trial. He noted:

If Mr. Harris were to tell the same story to the jury as he did under cross-examination prior to the appeal, and if he were to be believed, it would be open to the jury to find that he did not attack the complainant and that he was asleep before the complainant made her complaint about the appellant. His testimony about having consensual relations with the complainant the day before the attack would explain the presence of his semen on the white underwear. On the whole, Harris's evidence, if believed, would assist the Crown rather than the defence.¹¹⁴

The converse to this is that the trier of fact would reject portions of Mr. Harris's testimony given under oath at trial and accept what he was alleged to have told others out of court about the incident on a previous occasion.

Rosenberg J.A. declined to make a specific ruling about the admissibility of the hearsay evidence of Mr. Harris but provided the trial judge with some guidance on the matter. He reviewed the comments of Martin J.A. in *R. v. Williams*, specifically that:

It seems to me that a court has a residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard

¹¹⁴*Ibid.* at 30.

does not exist.¹¹⁵

Rosenberg J.A. went on to comment on some of the general principles related to the rules that exclude hearsay evidence. On the issue of defence evidence he wrote:

In my view, while the trial judge must be satisfied that the prior out-of-court utterances have some reliability, the strict standards set, in the context of an application by the Crown to make substantive use of prior inconsistent statements incriminating the accused, in *R. v. B. (K.G.)* do not apply: *cf. R. v. Eisenhauer* [emphasis mine, cite omitted].¹¹⁶

It is argued that these two passages, taken together, seems to create authority for the proposition that a residual discretion exists with the trial judges to allow the necessity for full answer and defence to trump the requirement for reliability. It is emphasized that this is the same trial and *Charter* right of the accused that was balanced above the rights of a sexual assault complainant to privacy and equality, as was examined in Chapter Two.

This result would appear consistent with the decision in *R. v. Chahley*.¹¹⁷ In this case the accused was charged with one count of first degree murder, ten years after the death of Mr. Bartko. This charge was laid after two of the accused's family members came forward and advised the police that their brother, the accused, had confessed to the

¹¹⁵*Ibid.* at 31. *R. v. Williams* is cited at (1985), 18 C.C.C. (3d) 356 (Ont. C.A.). The passage set out in the text was approved by Cory J. in *R. v. Finta* (1994), 88 C.C.C. (3d) 417 (S.C.C.) at 527.

¹¹⁶*Ibid.* at 31. The passage also makes reference to *cf. R. v. Eisenhauer* (1998), 123 C.C.C. (3d) 37 (N.S.C.A.) at 64, application for leave to the Supreme Court of Canada dismissed, August 20, 1998 [126 C.C.C. (3d) vi].

¹¹⁷(1992), 72 C.C.C. (3d) 193 (B.C.C.A.).

killing. The deceased, Mr. Bartko was known to the accused as a boy friend of his ex-wife, Ms. Cater. For our purposes, the key issue is the alleged statement of the deceased made to Ms. Cater, days before his death, about an unidentified black male who had threatened him with a knife. The trial judge excluded the evidence as inadmissible hearsay. At trial the accused was convicted and he appealed. The British Columbia Court of Appeal disagreed with the trial judge's ruling and ordered a new trial. Wood J.A. held that the statement was admissible as "original circumstantial evidence from which an inference could be drawn that he had a contemporaneously fearful state of mind."¹¹⁸ More importantly however, the Court went on to consider whether or not the same statement could be admitted for the truth of its content, particularly that the deceased had been threatened by a third person with a knife, thus leaving with the jury some circumstantial evidence that this unidentified person was responsible for the killing. Relying on the principled approach established in the *Khan* Case, Wood J.A. examined the issues of necessity and reliability. The necessity was obvious given the declarant was deceased. On the issue of reliability Wood J.A. stated:

The principal concern which underlies the rule against the admission of hearsay evidence is the trustworthiness of the out of court statements. ... the focus of that concern has always been the declarant, and *not* the person through whose mouth the declarations are tendered. The reliability of the witness who offers the hearsay testimony, and who is under oath and available for cross-examination, has much to do with the weight to be ascertained to the evidence, but in my view it ought not to be a condition of its admissibility. The weight to be ascribed to the evidence given under oath in a trial is a question of fact for the jury. It is not a question of law. The trustworthiness tests upon which the admissibility of hearsay evidence depends, on the other hand, ought to be legal tests which do not purport to invade

¹¹⁸*Ibid.* at 208.

the function of the jury [emphasis his].¹¹⁹

From this jurisprudential review, a clear reluctance by some courts to consider corroborating evidence, apart from the circumstances in which the statements were made, has been established. As already set out, this rule fails to further the fact finding mission of a domestic assault.

Given the unsatisfactory treatment by the law of this issue, our attention is now turned to an argument for reform. The American academic R. Parks has contemplated the issues of hearsay reform. In an article that explores the reasons for excluding hearsay he summarized the five major arguments to oppose hearsay reform in criminal cases. These included:

First, the conventional academic rational for excluding hearsay - lack of cross-examination of the declarant - appears frequently in the discourse of lawyers, and must be counted as a major reason for the exclusion. Second, concern has frequently been voiced about the danger of misreport and fabrication by the in-court witness. Third, lawyers have often alluded to the danger of surprise at trial. Fourth, lawyers have been concerned that hearsay reform would leave admission or exclusion to the uncontrolled discretion of the trial judge. Finally, concern has been expressed that the relaxation of hearsay rules will facilitate abuse of governmental power in criminal cases.¹²⁰

Examined individually, none of these reasons detract from the value of expanding

¹¹⁹*Ibid.* at 212.

¹²⁰R. Park, "A Subject Matter Approach to Hearsay Reform" (1987-88), 86:1 Michigan Law Review 51. This article explores the differences that exist between civil and criminal law. It is these differences that support his conclusions that a different set of rules regarding hearsay exclusion should be implemented.

threshold reliability to include the consideration of circumstances outside of process of statement recording. As already discussed, the complainant and the source of the hearsay evidence is available at trial for cross-examination. So too would the recipient witnesses, such as a neighbour, an ambulance attendant, a hospital worker or a police officer, that actually received the statement from the complainant soon after the incident. These witnesses could all be cross-examined to test the reliability of their recollections or even their motives to fabricate. Also, this would satisfy the right that an accused person has to face his accuser in court.¹²¹ The danger of being surprised at trial is all but eliminated by the rules of disclosure.¹²² However, if a situation did arise where certain evidence becomes known to an accused party or a prosecutor at trial for the first time, certainly the remedy of an adjournment is a far more equitable and reasonable solution than an automatic exclusion based on an occurrence possibility. As for the uncontrolled trial judge discretion argument, it is suggested that the consideration of more evidence not less evidence would assist trial judges in making less arbitrary and more consistent decisions regarding threshold reliability. Lastly, the concern about the facilitation of state abuse is decreased when the evidence is being tendered by unbiased civilians as described above. Therefore it is argued that more considerations as compared to artificial boundaries to

¹²¹*Ibid.* at 88, Parks examines hearsay and the confrontation clause, guaranteed under the sixth amendment of the U.S Constitution, that states “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witness against him.” *R. v. Eisenhauer* (1998), 123 C.C.C. (3d) 37 (N.S.C.A.) provides a thorough review of rational for the opportunity of an accused to be afforded the opportunity to cross-examine a witness.

¹²²*R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

exclusion would provide a greater opportunity for the truth to surface, particularly in situations such as abusive relationships where, for a number of reasons, the truth is often suppressed not only by the accused but also by the victim, who remains in continuous danger.

Moreover, these cases taken together, depict the courts adherence to strict application of the rules as they relate to the issue of threshold reliability on Crown applications, often ignoring circumstantial guarantees of trustworthiness that exist outside of the statement taking process. Nonetheless, the courts are willing to relax these general principles on behalf of the accused to avoid a miscarriage of justice. But what about the miscarriages of justice that would flow from the exclusion of hearsay evidence from a recanting witness on the grounds of threshold unreliability and where circumstantial evidence bearing on the issue of ultimate reliability is ignored? It is argued here that the exclusion of this evidence also amounts to a miscarriage of justice and, as such, this position should be reconsidered by the courts. It must be stressed that a principled analysis should not be technically applied. As R. Delisle reminds us:

B. (K.G.) was a case of an out of court statement being subjected to a principled analysis determining whether there were sufficient grounds of necessity and circumstances promoting reliability that the jury could be trusted to properly evaluate the worth of the statement.¹²³

Certainly the principled approach established in *Khan* and that has since evolved in

¹²³R. Delisle, “B. (K.G.) and Its Progeny” (1998), 14 C.R. (5th) 75.

Smith, B.(K.G.) and U.(F.J.) is flexible enough to take into consideration the contextual realities of the recanting witness trapped in a cycle of domestic violence to ensure that the search for the truth is not forsaken. It is contended that circumstantial guarantees of trustworthiness adds reliability to the fact finding mission of a trial without negatively impacting trial fairness for an accused person. It does not shift the focus of concern from the declarant, rather this type of evidence importantly helps create a context for an assessment of trustworthiness. It is an item of evidence within the realm of secondary materiality that should be used to value both the trial testimony of the recanting witness, as well as the reliability of the hearsay statement. For example, if one accepts that a complainant is trapped in a cycle of domestic violence as a result of learned helplessness, the context of why she remains in the violent and dangerous relationship, unreasonably believing the abuse will soon come to an end must be considered. Specifically, if in the "honeymoon" phase of the cycle of violence a female partner may be particularly vulnerable to refusing external assistance to end the violence. It should be recalled that while in this phase the victim believes that the contrite male batterer will make the necessary changes in his life so that the violence will stop. Similarly, if one supports the theory of a complex post-traumatic stress disorder one must also accept the position that a victim suffering from such a delusional state is not in the best position to appreciate all of the consequences of refusing to testify in a truthful manner in a criminal proceeding commenced against her abuser. Finally, the obvious must also be taken into account, the fear of retribution for her co-operation with the state prosecution. It is argued that all of these contextual realities must be factored into the concepts of flexibility and a principled

approach to the courts' consideration of a recanting domestic assault witness's out of court statements, in addition to all types of the relevant and material evidence that either supports or detracts from the issue of reliability.

(G) Conclusion

This chapter has attempted to provide a contextual explanation of the social phenomenon of domestic assault. There is very little consensus in the field as to the exact cause of this form of violence. In fact, it would appear that there are perhaps many different causes, some of which may be combined to further complicate the problem. Similarly, the many consequences of domestic assault for the direct victims, their children and society as a whole are still to be unravelled. Nonetheless, most experts agree on at least one effect and that is the cyclical nature of the abuse. Without intervention women trapped in abusive domestic relationships are in serious peril. The conventional response of the criminal justice system has failed to respond to the problem, particularly with regards to the issue of the recanting witness. Also, as was pointed out in Chapter One, this type of criminal offence is severely under-reported. It is suggested that the conventional criminal justice approach to dealing with incidents of domestic violence has only exasperated this contention.

This chapter presented two recent responses to the unique problems associated with the crime of domestic violence. The responses to domestic violence discussed above are

positive steps in the correct direction of increasing women's equal access to justice, but they too have their shortcomings. These limitations are grounded in an oversimplified appreciation of the intricate nature of the dilemma. With regards to the court mandated treatment more needs to be done to assess the type of treatment warranted in each situation presented to the court. More investigation is required to determine and isolate the causes unique to each male batterer so that appropriate counselling sessions and treatments can be provided. Also, efforts need to be reformulated to accurately assess the complainant's needs and wishes. When possible a spirit of co-operation should be fostered. Input from complainants must be respected and carefully assessed, even if it is not adhered to.

With regards to the K Court approach to the prosecution of domestic assault charges, advances must be made in the courts acceptance of the context in which situations of recantation occurs. A more expansive understanding of the principled approach to the rules assessing hearsay reliability needs to be accepted. This is not to postulate that the current considerations of threshold reliability need to be abandoned, but rather the considerations of external circumstances that either detract or bolster the reliability of the out of court statements also need to be added to that threshold equation. Jurisprudential authority for this principle was articulated in *R. v. U.(F.J.)* and is in keeping with the principled and flexible approach enunciated in all of the Supreme Court's recent considerations of the issue. As well, the traditional reservations, as described by R. Parks and that have been perfunctorily connected with the reluctance to broaden the principles

should be re-evaluated to support the need for further reforms in the area. In this way the court's search for the truth is improved, without affecting trial fairness for the accused. This is particularly true when a declarant is available for cross-examination. Both of these reform issues are expanded upon in Chapter Four.

Lastly, the theme of unequal treatment characterizes the residual discretion outlined in *R. v. Kalisa* and *R. v. Folland*. These cases depict a concern for the doctrine of an accused's right to full answer and defence unbalanced against the essential requirement of reliability. This theme is presented as an extension to the disparity presented in Chapter Two, specifically the courts resolution of the conflicted interests of the male accused and the female sexual assault complainant.

CHAPTER FOUR: REFORMS

(A) Introduction

Chapters Two and Three show that the criminal justice system has failed to provide female victim's of violent crime equal treatment within our courts. The equal treatment warranted to remedy this situation, under section 15 of the *Charter*, is a criminal justice system that accommodates their differences and prevents the violation of their essential human dignity and freedom.¹ As well, situations have been identified that prevent or dissuade females from accessing the criminal justice system entirely. If female complainants decide to initiate contact with the criminal justice system they often end up feeling powerless and largely ignored in the process. The consistent stumbling block to meaningful and impartial access for women has come as result of the criminal justice system's failure to contextualize the issues that confront some female victims when they have been involved in violent crimes such as sexual assaults or physical abuse within a domestic relationship. This recognized problem accounts for, at least in a partial sense, why women under report these types of crimes and why when they do become involved as prosecution witnesses, they are frequently reluctant to participate in the judicial process.

As discussed in Chapter Two, complainants of sexual assault who have sought out

¹See *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.) at 10 and 13; and *Law v. Minister of Human Resources Development* File No.: 25374, judgement March 25, 1999 (S.C.C.) at 13, for thorough discussions of the meaning of legal equality.

counselling and/or therapy to assist them in their healing process are often confronted, during the trial process, with the dilemma of having their confidential counselling records disclosed to the court and perhaps even counsel for the accused. We have seen that when the *Charter* rights of these two individuals come into conflict with each other, the male accused's rights to full answer and defence have been balanced above, or given a priority over, the female complainant's rights to privacy and equality.² This chapter suggests a reform that may assist women in the criminal litigation process. The key to this reform is the recognition of the significant harm that flows to a sexual assault complainant from either the delaying of treatment or the interruption of the counselling process. The reform examined is judicial notice of the harm that flows from the disclosure of these extremely sensitive materials and how this legal principle should be used in conjunction with Bill C-46³ for the determination of the issue of relevance of these records.

With regards to rectifying the criminal justice system's response to the prosecution and deterrence of men who physically abuse their female partners, this chapter suggests reforms that will account for the complexity of the many variables connected with this dangerous and widespread social practice. On the treatment side of the issue, it is postulated that the careful and individual contextualization of domestic assault matters is the key to success. Once the needs of both the complainant and the accused are properly

²*Canadian Charter of Rights and Freedoms*, ss. 7, 8, and 15, Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

³*Criminal Code*, R.S., c. C-46 [hereinafter Bill C-46].

and professionally assessed, appropriate responses can be formulated. In this chapter, strengths of the restorative justice scheme are examined and molded to fit the transformative needs of couples that wish to resurrect a healthy domestic relationship from one that is dangerously dysfunctional.

(B) The Disclosure of Sexual Assault Complainant's Counselling Records

1. Judicial Notice

In this section the principle of judicial notice is described. Following this an argument is presented that judicial notice could, and should, be used in a court's assessment of an accused's application for the disclosure of a complainant's counselling records. To articulate this position a review of the distinction between adjudicative and legislative facts is undertaken. An important component of this distinction, specifically the role of judges as law makers is highlighted. Two options to incorporate this principle to the issue of disclosure has been presented in this material. The first is one based on legal precedents and the second is founded in principle. To further this position a brief presentation of a case that deals with the issue of the judicial interpretive process connected to a section 1 *Charter* determination has been provided. As well, a number of cases that address the issue of how the courts have dealt with the issues of racial prejudice, judicial notice and the jury selection process have been briefed. Lastly, to support the principled rationale, the relevant sections of Bill C-46 have been examined to help conclude the usefulness of this

reasoning to the dilemma of the disclosure of sexual assault complainant's counselling record.

The law in Canada regarding judicial notice is that a fact which is generally known and accepted such that it cannot be reasonably questioned need not be formally proven in court. It is a type of fact which is notoriously "known to intelligent persons generally."⁴ If a fact is not known and accepted it may still qualify as a fact that judicial notice can be taken of, if it can be verified in a source whose accuracy cannot be questioned.⁵

The issue then becomes how, if at all, can this legal principle be applied to the harm that flows from the opening and the disclosing of the contents of a sexual assault complainant's counselling records? At first glance, the jurisprudence in the area is not overly helpful. For example, the courts have traditionally rejected the notion of taking judicial notice of previously accepted scientific knowledge and the evidence of experts given in other judicial proceedings.⁶ Similarly, the courts have been reluctant to admit scientific

⁴*Reference re Alberta Statutes*, [1938] S.C.R. 100 at 128.

⁵J. Sopinka, N. Lederman and A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 976. For example judicial notice can be taken of the existence of a provincial legal aid system; see *R. v. Cobham* (1993), 92 C.C.C. (3d) 333 (S.C.C.). See also *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.).

⁶*R. v. W.(S.)* (1991), 6 C.R. (4th) 373 (Ont. C.A.); a trial judge could not take judicial notice of a "cultural disinclination" of a Native Canadian sexual assault complainant to relive past unpleasant experiences. *R. v. Dickson* (1973), 5 N.S.R. (2d) 240 (N.S.C.A.); a trial judge could not take judicial notice of the period and process of absorption of alcohol in the human body.

positions, reports or literature on a particular matter that has not been tendered into evidence by one of the parties before that court.⁷ This is particularly true of “social facts” directly relevant to the dispute before the court.⁸ Thus, relying only on the traditional position that the courts have taken regarding the acceptance of facts based on judicial notice and not on evidence tendered by one or more of the parties to the litigation, the likelihood of judges being allowed to take judicial notice of a fact such as the psychological harm that flows from the opening and disclosing of therapeutic records is not particularly favourable.

However, when we examine the principle itself and how it has been expanded in other areas, such as the jury selection process, some exciting possibilities emerge. To begin our examination we should consider the American treatment of judicial notice. The law in the United States has clearly distinguished between two different types of fact; adjudicative facts and legislative facts.⁹ Adjudicative facts are those facts that relate to issues that are unique to the case being heard by a court. These types of facts relate to the specific parties

⁷*R. v. Parnell* (1995), 98 C.C.C. (3d) 83 (Ont. C.A.); *R. v. Desaulniers* (1994), 93 C.C.C. (3d) 371 (Que. C.A.) at 377; reference by a judge, on his own initiative and without there being any suggestion on behalf of the parties, to a scientific work or report which sets out opinions of experts, constitutes an error in law, leave to appeal to S.C.C. refused (1994), 95 C.C.C. (3d) vi.

⁸*Cronk v. Canadian General Insurance Co.* (1995), 128 D.L.R. (4th) 147 (Ont. C.A.); the assumption of a motions court judge, that clerical employees were able to obtain employment more easily than management, was beyond the scope of judicial notice.

⁹See K. Davis, “Judicial Notice” (1955) 55 Columbia Law Review 945. See also 29 Am. Jur. 2d, *Evidence* at paragraphs 27 to 30 for a review of the types of facts related to judicial notice.

and their actions that make up the subject matter of the litigation. On the other hand, legislative facts relate to determinations on questions of law or policy. Legislative facts assist a court in interpreting the content of legal rules and their application to the issues before the court.

This distinction has been similarly recognized by Canadian academics. For instance, D. Paciocco and L. Stuesser note that adjudicative facts refers to the facts that must be determined in a specific case. On the other hand, they describe legislative facts as:

those that have relevance to legal reasoning and the law making policy. They are not directed at resolving a specific factual issue in the case before the court. Rather, they are resorted to when the courts are asked to make law, which is a matter that transcends the particular dispute and is of general social importance.¹⁰

An example of this process is when a court is called upon to determine the constitutional validity of a law under section 1 of the *Charter* or when it is asked to interpret legislation. To effectively complete this task, the courts rely upon a wide range of social science research and study.¹¹ It has been put forward here that the courts, as they interpret Bill C-46, should take judicial notice of the legislative facts linked to the ramifications of the opening and disclosing a sexual assault complainant's private counselling records. We shall return to this momentarily, but first another distinction in the types of facts should be

¹⁰D. Paciocco and L. Stuesser, *The Law of Evidence* (Concord Ont.: Irwin Law, 1996) at 246. See also S. Schiff, *Evidence in the Litigation Process*, 3rd. ed., (Toronto: Carswell, 1988) vol. 2 at 661 to 713.

¹¹*Ibid.* at 246. See also C. L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 *Ottawa Law Review* 551 at 554.

reviewed.

Two other American academics have taken the distinctions one step further. L. Walker and J. Monahan, describe three related categories of facts; social authority, social framework and social facts.¹² Social authority, describes situations wherein social science is used to establish or interpret the law in some fashion. They compare its use by courts as legal precedent because both social science and legal precedents have ramifications for other members of society beyond the immediate litigants to a legal conflict. In this way social authority parallels the principles of legislative facts. When social science research is used to resolve a conflict specific to individual litigants, it is categorized as a social fact. This is obviously similar to adjudicative facts. The third category of facts, social framework, is a combination of the first two, and is used to describe the facts that flow from social science research that creates a background of social context to assist a court in the determination of a specific dispute particular to individual litigants.¹³ This category of social framework could also apply to the issue of the harm and its impact on a specific sexual assault

¹²J. Monahan and L. Walker, "Social Authority: Obtaining, Evaluating and Establishing Social Science in Law" (1986) 134 U. Pa. Law Review 477. This work advances the thesis that "social science research, when used to create a legal rule, is more analogous to 'law' than to 'fact' and hence should be treated much as the courts treat legal precedent." at 478.

¹³These descriptions are a summary of C. L'Heureux-Dubé's review of L. Walker and J. Monahan's work, *supra* note 12 at 555 to 556. See also L. Walker and J. Monahan, "Empirical Questions without Empirical Answers" (1991) Wisconsin Law Review 569. This article examines the problems that courts encounter when empirical questions do not have empirical answers and offers suggestions on how courts should proceed in the absence of data.

complainant who has counselling records and wishes to keep the contents of those records private.

Related to this, C. L' Heureux-Dubé points to the fundamental role that the judges must play in the evolution of legal principles to help clarify the distinction. She notes that if *stare decisis* was applied without consideration for the evolution of context changes within society the law would quickly fail in its goal to maintain order through public respect.¹⁴ This is why the Canadian courts have traditionally been recognized as playing a policy making role in the administration of justice rather than merely designated a passive role in the determination of what the law is based exclusively on precedents. Also, since the courts do perform such a role, the decisions made by judges must be subject to appellate scrutiny. Related to these issues, she wrote:

The way in which the role of the court is perceived can, in turn, very much affect the way in which the doctrine of judicial notice is conceptualized. The more courts acknowledge their active contribution to law making, the greater becomes both their duty and their need to lay bare the policy assumptions upon which their decisions are based.

On the other hand, if courts deny their law making role, then they deny our judicial system the ability to monitor that role. Unfortunately, however, a by-product of imposing strict rules on the taking of judicial notice is that such rules discourage courts from admitting that they use it. As a consequence, underlying questions of policy are obfuscated by a mask of "legal principles." Principles formulated on such a basis, in turn, may lead to illogical applications in subsequent cases. Judicial notice must not be a convenient means by which courts can escape examination of

¹⁴One example that was developed in this regard was the principled approach of hearsay exceptions in *R. v. Khan* [1990] 2 S.C.R. 53 and *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.). This policy evolution was discussed in Chapter Three.

their underlying policy assumptions.¹⁵

As indicated earlier, there are also precedents from the Supreme Court of Canada to support a court's reliance on reliable information through the doctrine of judicial notice to assist in its section 1 Charter rights violation scrutiny. For example, in *R. v. Edwards Books, La Forest J.*, held:

I do not accept that in dealing with broad social and economic facts such as those involved here the Court is necessarily bound to rely solely on those presented by counsel. The admonition in *Oakes* and other cases to present evidence in Charter cases does not remove from the courts the power, where it deems it expedient, to take judicial notice of broad social and economic facts and to take the necessary steps to inform itself about them.¹⁶

Beyond *Charter* cases, the Courts have also examined the issue of judicial notice and the existence of racial prejudice in society as it is related to the legal process of juror selection. In *R. v. Parks*¹⁷ the Ontario Court of Appeal determined that a court could take judicial notice of the fact that racism does exist in our society. This type of fact determination would fall within either the categorization of legislative fact or of a social authority fact,

¹⁵C. L'Heureux-Dubé, *supra* note 11 at 558. See also S. Schiff, *Evidence in the Litigation Process*, 3rd ed., (Toronto: Carswell, 1988) vol. 2 at 682 for a discussion of the role of the judiciary in making law.

¹⁶*R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 804. This case dealt with the Charter right freedom of religion and whether provincial legislation that required Sunday closings would withstand constitutional scrutiny. The Court held that the legislation was enacted for the secular purpose of providing a uniform holiday for retail workers. It examined the legislation in light of its contextual purpose.

¹⁷(1993), 84 C.C.C. (3d) 353 (Ont. C.A.); leave to appeal to S.C.C. refused 87 C.C.C. (3d) vi. See also *R. v. Willis* (1994), 90 C.C.C. (3d) 350 (Ont. C.A.).

described above. This case involved a black male that was charged with second degree murder. It was alleged that he was also a drug dealer and that the white deceased was a cocaine user. The killing occurred during a fight between the two parties that erupted during a drug transaction. Of significance here was the trial judge's determination as to the appropriateness of the accused being allowed to question potential jurors about any preconceived racial biases that would impact on their ability to be impartial jurors. The Court of Appeal held that the accused should have been allowed to question potential jurors if the facts of this case, specifically that the accused was black and the deceased was white, would affect their impartiality. It is important to note that no evidence was called by either party at trial to support the position that racial prejudice did exist in the community from which the potential jurors were selected or that any of the jurors that did decide the case were impartial due to racial prejudice. In coming to their conclusion the Court relied on a number of social science studies and references dealing with racial prejudice in Canada. Doherty J.A., writing for the majority noted that:

The existence and the extent of racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts. Unlike claims of partiality based on pre-trial publicity, the source of the alleged racial prejudice cannot be identified. There are no specific media reports to examine, and no circulation figures to consider. There is, however, an ever growing body of studies and reports documenting the extent and intensity of racist beliefs in contemporary Canadian society.¹⁸

The Court also went on to articulate a cost/benefit analysis of the decision to allow empaneled jurors to be questioned on issues of racial prejudice that could effect their

¹⁸*Ibid.* at 366. No fewer than nine Canadian reports or studies are cited in the decision, in addition to a number of American works.

impartiality. The only cost noted was a “small increase in the length of the trial.”¹⁹ On the benefit side three advantages were noted. First, that a potential juror, who would discriminate against an accused because of racial prejudice, could be eliminated from the jury. Second, all potential jurors are sensitized from the beginning of the process that racial biases must not be a factor in their fact finding mission. And third, that allowing such a question enhances the appearance of trial fairness in the mind of the accused.²⁰

The fact of racial prejudice was also examined in the Supreme Court of Canada in *R. v. Williams*.²¹ This case involved allegations that resulted in an aboriginal person being charged with robbery. At the second trial the judge disallowed a challenge for cause question, based on possible racial prejudice against aboriginal persons, to be put to the potential jurors. The Supreme Court held that a question testing for such a bias should have been allowed because there existed a realistic potential of partiality. The matter was returned for a new trial. McLachlin J. writing for the Court, addressed the matter of judicial notice. Relying on the Sopinka, Lederman and Bryant text, she held:

The existence of racial prejudice in the community may be a notorious fact within the first branch of the rule....Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of

¹⁹*Ibid.* at 379. Note that the Court did not rely on a cost/benefit analysis in coming to its conclusion, stating that “fairness cannot ultimately be measured on a balance sheet.” at 379.

²⁰*Ibid.* at 379.

²¹(1998), 124 C.C.C. (3d) 481 (S.C.C.).

the fact. “The fact that a certain fact or matter has been noted by a judge of the same court in a previous matter has precedential value and it is, therefore, useful for counsel and the court to examine the case law when attempting to determine whether any particular fact can be noted.” It is also possible that events and documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community under the second branch of the rule.²²

This issue was recently revisited *R. v. Koh*.²³ In this case the accused Chinese men, visiting Canada from Singapore, were charged with conspiracy to import heroin for the purposes of trafficking and other related charges. The trial judge refused to allow the accused to question potential jurors by asking: “Would the fact that the accused are persons of Chinese origin and visitors from Singapore affect your ability to judge the evidence fairly and without prejudice?” After being convicted at trial the men appealed and the Ontario Court of Appeal ordered a new trial, holding that a question related to their membership in a visible racial minority should have been allowed. The issue of judicial notice regarding racial attitudes was specifically addressed. Finlayson J.A., held that:

Although the trial judge was entitled to take judicial notice of the fact that there is a substantial population of persons of Asian origin in the community, it is my opinion that he was not entitled to take judicial notice of the “fact” that Chinese people are judged individually and are not classed as a race.²⁴

The rationale for this position was that the unentitled fact did not fall within either of the two categories set out initially in this section, a notorious fact or one that can demonstrated as accurate from an indisputable source. Regardless, racism against visible

²²*Ibid.* at 502. See also J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 977.

²³ (1999), 42 O.R. (3d) 668 (Ont. C.A.).

²⁴*Ibid.* at 674.

minorities has been held to be a notorious fact.²⁵ Additionally, Finlayson J.A. provided *obiter dicta* to the effect:

My suggestion that the courts in this jurisdiction may now take judicial notice that reasonable persons must be taken to be aware of the history of discrimination against visible minorities finds practical support in the reality that an accused will often face insurmountable difficulties in marshalling evidence to meet the threshold test with respect to individual minorities of colour.²⁶

Thus, in this review of the current state of the law as it relates to the judicial notice of racism for visible minorities, a trend is revealed indicating the willingness of Canadian courts to rely on social science research, as well the social realities that exist, to make common sense policy based interpretations of legal principles to increase trial fairness - at least for accused persons. This has been achieved through the legal principle of judicial notice.

Applying this reasoning to promote a jurisprudential argument for the purpose of the expansion of judicial notice principles to include the harm that flows from the disclosure of a sexual assault complainant's counselling records and thereby increase trial fairness for female witnesses, one must consider the courts' discussions regarding the types of facts that can be included in the principle of judicial notice? For example, it was held "judicial

²⁵*Ibid.* at 678. See also *R v. Williams* (1998), 124 C.C.C. (3d) 481 (S.C.C.) at 502.

²⁶*Ibid.* at 680. The Court also held that to require each visible minority to adduce evidence in support of an application to be allowed to question a potential juror about racial prejudices would be inconsistent with section 11(d) of the Charter that ensure everyone's right to a fair and impartial tribunal.

notice is permissible where previous courts have proven a certain fact.”²⁷ Therefore, if it has been established that in the case of racial prejudice, once one court has made a finding of fact as to its existence and the potential for injustice that could flow from this, and that subsequent courts may also be able to take judicial notice of this fact, then the argument can be made that once one court has made a finding of fact that a significant harm does flow from breaching the privacy of a complainant undertaking therapy or counselling, then other courts may find as a fact that these types of intrusion could have a similar impact on all women complainants. This judicial notice would allow the trial courts, charged with the responsibility of determining the disclosure of these sensitive records, to assess the issues in a more equal and consistent fashion. It would help provide a context to distinguish these types of material from other forms of disclosure. Moreover, it would give significance to the wording of legislation that sets out the conditions and factors that must be weighed in the courts determination of the issue and the balancing of the competing interests of the male accused and the female complainant.

From a principled perspective, it can be maintained the legislation created to address the production of complainant’s counselling records must be interpreted by the courts. To do so, it is argued, the courts charged with the responsibility to assess these applications should be allowed to consider, or take judicial notice, of certain “legislative facts.” In particular, it is suggested that when one examines Bill C-46 in its entirety (as was done in Chapter Two) its purpose becomes quite clear. It is an exhaustive guide for the courts that

²⁷*Ibid.* at 679; *R. v. Williams*, *supra* note 25 at 502.

are requested to balance the competing interests and legal rights of the accused and the complainant.

Therefore, when the courts are asked to interpret Bill C- 46, it is suggested that they could, and should, take judicial notice of the harm that flows from the invasion of a sexual assault complainant's private counselling records. It should be recalled that it has been argued previously that this harm has two components; the first is linked to the individual complainant whose course of treatment is interrupted and her willingness to access justice in the criminal courts affected, and the second is connected to the chilling effect that the possibility of disclosure has on other women who have been victimized by sexual violence to come forward with their complaints. It is argued that this form of judicial notice would fall within the parameters of a "legislative fact" and as such the courts could rely on social science research and impact studies in their determination of this disclosure issue. Through this analysis, both the insufficient grounds set out in section 278.3 (4) and the factors to be considered set out in section 278.5 (2) would then be interpreted in a context that recognizes the type of injuries that are caused by a sexual violation as well as the intimate nature of these counselling records.

More specifically, section 278.3(4) prohibits a court from making inferences of relevance on certain facts alone. These facts, presented in full in Chapter Two, include the mere fact that a counselling record exists, that it relates to the incident that is the subject matter of

the criminal trial, or that the record may relate to the credibility of the complainant.²⁸ As well, section 278.5(2) sets out permissible factors that must be considered by a judge reviewing such a disclosure application. The factors that arguably require some level of attentiveness to legislative facts include whether the production of the record is based on a discriminatory belief or bias (indistinguishable from racial prejudice that has been judicially noticed); society's interest in encouraging the reporting of sexual offences; society's interest in encouraging the treatment of sexual assault complainants; and the impact of the determination of the issue on the integrity of the trial process.²⁹ In short, as the accused attempts to tender sufficient evidence of relevance to persuade a court that he has established that the counselling record is likely relevant to an issue at trial and that the production of the said record is necessary in the interests of justice,³⁰ the court must consider both the individual impact on the complainant and societal impact of the request in making its findings.

This would allow for a more contextual appreciation of the impact that such disclosure orders have, not only on the female witness's opportunity to advance through the healing process, but also enhance the equal treatment of all complainants. Additionally, this judicial recognition and the resulting protection of a right to privacy may also hopefully increase women's willingness to avail themselves of justice through the criminal trial

²⁸Criminal Code, R.S.C. 1985, c. C-46, [hereinafter Criminal Code] section 278.3(4).

²⁹Criminal Code, section 278.5 (2) (d), (f), (g) and (h).

³⁰Criminal Code, section 278.5 (1) (b) and (c).

process. Obviously, women complainants' treatment in the criminal justice system requires the preliminary step of a decision by those complainants to access justice in the criminal courts.

(C) Domestic Assault

Due to the complexities of the domestic assault problem in our society, any meaningful reform must include a co-ordinated and collaborative effort of all interested stakeholders in the criminal justice system. These stakeholders include investigators, health care providers, prosecutors, defence counsel, judges, treatment professionals, and probation and parole service providers. As well, outside of the criminal justice system, the input from other individuals who are committed to preventing domestic violence, such as those individuals running the women shelters, academics and researchers, must also be considered. A multi system and well orchestrated approach is required to put an end to this oppressive form of violence. The reforms examined here should be contemplated not as alternatives to each other but rather as a variety of options that need to work union with each other if real change is to occur and lives are to be saved.

1. Unified Court

As was pointed out in the last chapter, a significant problem that arises frequently in the prosecution of domestic assault charges is the complainant's unwillingness to co-operate

with the process. The criminal justice system's response of leniency coupled with education and counselling for the remorseful and contrite accused is an important and progressive step forward to assisting the female partner caught in a cycle of violence who wishes to remedy the dilemma and maintain a safe relationship.

There are two basic types of court mandated treatment programs for males who physically abuse their female partners. The first is the type that has been implemented in Brampton, Ontario. This model has been described by some as "pretrial diversion."³¹ In this style of response, an accused can avoid a criminal conviction or perhaps have his charge and sentence reduced on the successful completion of a treatment program. The second initiative type is requiring a male party attend a court sanctioned treatment program as part of a sentence imposed after conviction. This model has been implemented in the Toronto K Court response. Failing to complete either program presents a difficulty for both models although, as discussed earlier, more so for the pretrial diversion response because of the ramifications of same on the eventual prosecution of the charges. Few studies have been completed to discover whether or not the form of mandating treatment has any impact on the completion of the programs and the resulting effects on recidivism.

D. Saunders and J. Parker did find that about two-thirds of the men who undertook

³¹National Research Council, N. Crowell and A. Burgess eds., *Understanding Violence Against Women* (Washington D.C.: National Academy Press, 1996) at 122. This term is perhaps inappropriate because the passing of sentence still takes place within the criminal courts and as such the accused is not diverted out of the criminal justice system, as is the case for other crimes such as shoplifting. Restorative justice principles urge that, in some cases, true pretrial diversion programs should be given an opportunity to succeed where traditional criminal justice responses have failed.

treatment because of court orders completed the program, compared to two-fifths of the men who started treatment that was not court ordered.³² These findings suggest that more research is needed to determine the cause and effect relationship between how one is channeled into a program and its impact on completion rates.

Regardless of the relationship, it is important to note that a significant number of men do fail to complete treatment programs and it is suggested that a response must be planned for the accused who is unwilling to complete a treatment program. To rely on the conventional approach of prosecution for this type of offence is unwise, primarily due to the issues connected with a recanting witness. Therefore, in addition to pretrial diversion model, what is also needed is a diligent prosecution model, such as the K Court initiative. In this way the criminal justice system can, in the appropriate circumstances (for example where minimal levels of violence are alleged) allow an accused to admit responsibility and then be treated for the violent behaviour in an environment of co-operation. However, when an accused is given the opportunity to modify his behaviour and fails to complete his counselling, an option of diligent prosecution must also exist. As well, a collaborative effort is required by investigators, prosecutors and probation and parole service providers to ensure violent offenders are brought to justice and deterred from recidivism.

³²D. Saunders and J. Parker, "Legal Sanctions and Treatment Follow-through Among Men Who Batter: A Multivariate Analysis" (1989) September, Social Work Research and Abstracts, 21.

2. Restorative Justice / Transformative Justice

i. Language

In this section the concepts connected with the broader philosophy of restorative justice are examined. Once this is completed these ideas are analyzed to determine whether or not they have a role in reforming the difficulties associated with the prosecution of domestic assault cases, described in chapter three. However, before this can be commenced it should be re-emphasized that, as it was set out in chapter one, the language used to describe an issue brings with it certain notions and connotations for both the reader assimilating the information as well for the author describing the features of the particular issue. The common understanding of the word “restore” implies a return to an earlier held position or status. It should not be the goal of any criminal justice response to restore, or return a female victim back into, a relationship and environment where violence of any kind is used by one partner to control another. In short, the restoration of a violent relationship is obviously a non-starter. The word “transformative” is far more acceptable as it connotes, at least to this author, a positively changed or improved relationship uninhibited by violence. It suggests a non-violent reconciliation. Yet, it is also a specific term that D. Moore and J. McDonald have applied a specific meaning to.³³

³³This term has been adopted by a movement co-founded by David Moore and John McDonald in 1995. Transformative Justice Australia has as its primary emphasis, collective engagement, emotional transformation and social support, rather than on shame, reintegrative or otherwise. See online: Transformative Justice Australia <<http://www.tja.com.au/menu.htm>> (date accessed: 15 June 1999).

Philosophically, they have described “transformative justice” as a:

practical philosophy that sees crime as a violation of people and the relationships between them. It views the conflict resulting from crime as an opportunity to achieve transformative healing for all those affected. Transformative justice sees problems beginning not only with the crime but also with the causes of crimes. It employs processes that treat the incident as a transformative relational and educational opportunity for victims, offenders, and all other members of the affected community. Transformative processes must therefore employ mechanisms for building and repairing human relationships.³⁴

Transformative justice advocates believe that the mechanisms used to impose social regulation should be based on an understanding of human motivation on both the “intrapersonal and interpersonal” level. Therefore, it’s primary focus for reform is understanding the emotional basis of a conflict and its transformation into something inherently better. Thus, although the term itself may have a more appealing tone to it, it also has connected to it a specific process and aim different from restorative justice paradigms and should not be confused. Still, the criticisms of restorative justice principles, as they apply to repairing violent domestic relationships, may apply equally to these principles, that urge a community based response to domestic violence. Regardless, the purpose here is to outline the appropriateness of the nomenclature so that when references are made to restorative justice concepts it should be inferred that the aim of the reforms discussed here are reconciliatory or transformative in nature rather than restorative.

³⁴*Ibid.* at TJA Philosophy (date accessed: 15 June 1999).

ii. The Restorative Justice Philosophy

An effective way to appreciate the philosophy of restorative justice is to juxtapose its principle next to the conventional criminal justice response to crime, or what Kent Roach described as a “punitive model.”³⁵ He explained the distinctions around the role that the victims of crime played in each paradigm:

A punitive model of victims’ rights promoted the power of the traditional agents of crime control - legislatures, police and prosecutors - while not necessarily empowering crime victims and potential victims.³⁶

A non-punitive model of victims’ rights based on crime prevention and restorative justice presented a far more radical challenge to the criminal justice system than due process or punitive forms of victims’ rights.³⁷

This distinction is a focus for the Nova Scotia Restorative Justice Program.³⁸ It described the conventional approach as an “adversarial system” that defines crime as a violation of rules that brings about harm to the state. In this system the victim does not play a primary role in resolution and the offender, if convicted, is blamed, stigmatized and punished.

Contrary to this, a restorative justice model presents victims as central to the criminal justice system’s process of both defining harm and how it might be repaired. In a forum

³⁵K. Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999). This work is primarily concerned with how the system’s stakeholders, including legislators, judges, interest groups, and the media have defined certain criminal justice issues and its ideologies.

³⁶*Ibid.* at 5.

³⁷*Ibid.* at 6.

³⁸Nova Scotia Department of Justice, *A Program for Nova Scotia: Restorative Justice* (Halifax: Department of Justice, 1998).

that encourages repentance and forgiveness, restorative justice relies on community involvement to hold the offender accountable and to provide that offender with the opportunity to make amends. Critically, the victim is given the chance to play an active role in determining a resolution to the offence.³⁹ In this fundamental shift both the primary goals (the reduction of recidivism and increased victim satisfaction) as well as the secondary goals (strengthened community support and increased public confidence in the criminal justice system) are emphasized.⁴⁰

However, it is significant to note that Nova Scotia's Restorative Justice Program has recognized the ongoing debate taking place in Canada regarding the appropriateness for domestic violence and sexual assault offences being included within the realm of this justice system. The primary focus for this concern is the "possible power imbalance between the victim and the offender in a restorative forum."⁴¹ As a result, these types of offences will only be considered as appropriate for post-conviction, pre-sentence and post-sentence restorative justice "entry point" considerations.

³⁹Nova Scotia Department of Justice, *A Program for Nova Scotia: Restorative Justice* (Halifax: Department of Justice, 1998) at 2. For an extensive review of these principles see J. Llewellyn and R. Howse, "Restorative Justice - A Conceptual Framework" (Prepared for the Law Commission of Canada) online: < <http://lcc.gc.ca/en/papers/howse.html> > (date accessed: 15 June 1999).

⁴⁰*Ibid.* at 5.

⁴¹*Ibid.* at 15.

Some of these restorative justice issues were recently examined by the Supreme Court of Canada in *R. v. Gladue*.⁴² This case involved an aboriginal female accused, who pled guilty to one count of manslaughter after she stabbed her common law spouse twice, once in the chest and once in the arm. She was sentenced to three years of imprisonment. Both the British Columbia Court of Appeal and the Supreme Court of Canada dismissed her appeal related to the fitness of her sentence. Of significance here is the Courts discussion of sentencing principles, particularly those related to restorative justice. Cory and Iacobucci JJ. writing for the Court, considered the parameters of s. 718.2(e) of the Criminal Code⁴³ and its application to the facts before the Court. Section 718.2 sets out the principles of sentencing, including:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.⁴⁴

The Court recognized the concept and principles of restorative justice as a form of community-based sanctioning and that these notions would develop over time in the jurisprudence. The Court, in recognition of the concept wrote:

In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victim, the community, as well as the offender.⁴⁵

⁴²[1999] S.C.J. No.19.

⁴³R.S.C., 1985, c. C-46, Part XXIII [repl. 1995, c. 22, s.6], s.718 (2).

⁴⁴*Ibid.*

⁴⁵*R. v. Gladue*, *supra* note 42 at paragraph 71.

Thus it can be said that the restorative justice is a philosophical framework or a new method of looking at criminal behaviour and conflict. It extends the concept of crime from a personal viewpoint to that of a collective societal perspective. It places much of the responsibility of conflict resolution back within the community.⁴⁶

iii. Application to Domestic Assaults

It is important to note that, for the most part, the principles discussed to this point have not been exclusively directed at domestic violence. They have been examined from a non-specific criminal conduct perspective. The issue now debated is whether or not they have an applicability to domestic assault offences. To answer this question we must return to the concept of context. It is contended that there may be a place for these kinds of initiatives in a limited type of domestic violence, but there are some significant hurdles that must be overcome once it can be ascertained that they are an effective means of reducing domestic violence occurrences.

Applying these broad restorative justice principles to the social dilemma of domestic assault one must contemplate how well this victim based approach contextualizes the position and needs of an abused female partner, as well as the possible causes and consequences of her partner's aggressive conduct. If she wishes to have her legal rights

⁴⁶Nova Scotia Department of Justice, *supra* note 38 at 2 and 11.

protected and personal safety ensured through the prosecution of an offence then those wishes must be at a minimum be assessed - if not adhered to. If a complainant desires that her abuser should face conventional criminal sanctions, such as deterrence through conviction, incarceration or some less severe form of punishment, then her best interests must not be presumed and her situation delegated to a perceived second class tier of criminal justice.⁴⁷

Assuming that this component of the victims needs are correctly assessed, some academics believe that because the philosophy of restorative justice is focused on “restoration and prevention” and provides for “healing, empowerment, forgiveness, and an identity that is richer for not being circumscribed by victimization” it is well suited to reducing incidents of domestic violence.⁴⁸ The opportunity to place the domestic assault victim at the centre of the process is key, as K. Roach explains:

Unlike in the punitive victims’ rights, crime-control, or due process models, the victim’s decision not to invoke the criminal process deserves respect unless it can be shown that it only reflects coercion or the inadequacies of the present system....An important step here is to define victims as the best judges of their own interests and not to see their actions as a product of learned helplessness.⁴⁹

Two other academics share this perspective. J. Braithwaite and K. Daly have developed a

⁴⁷See S. Merry, *Getting Justice and Getting Even* (Chicago: The University of Chicago Press, 1990). The issue of the potential for cultural domination of women’s legal rights is discussed in Chapter Three.

⁴⁸K. Roach, *supra* note 35 at 37.

⁴⁹K. Roach, *supra* note 35 at 33.

community-based response to domestic violence. They propose a “community conference” in which the sanctioning principle of shaming is structured into a process that requires the victim and her supporters to be included. The aim of reintegration of the offender is accomplished through the participation of his family and friends. This conference is then placed at the bottom rung of a hierarchy of a series of increasingly severe and punitive initiatives (ultimately including incarceration) to combat domestic violence.⁵⁰

To analyse these positions we must return to our central theme of context. Here context is focused on what considerations are made for the specific causes and consequences of the violent behaviour. For example, how responsive is a psychological or an alcohol related aggression to the deterrent of shame? Where is the particular victim to be located on the escalating scale of severity with regards to the violence and what type of risk to further harm is she currently facing if forced to be a central figure in a deterring process? What if the victim is trapped in a cycle of violence that has affected her judgement such that she believes their own couple-based solution is a tenable cure? One author and researcher who is skeptical about the potential of restorative justice as a panacea for domestic violence is J. Stubbs.

⁵⁰J. Braithwaite and K. Daly, “Masculinities, Violence and Communitarian Control” in T. Newburn and E. Stanko eds., *Just Boys Doing Business: Men, Masculinity and Crime* (London: Routledge, 1994) as cited by J. Stubbs, “‘Communitarian’ Conferencing and Violence Against Women: A Cautionary Note” in M. Valverde *et al.*, eds., *Wife Assault and the Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995).

She interviewed 88 female victims of domestic violence about the outcomes of their efforts to obtain a protection order from before the Australian courts. From these interviews she found that it was very difficult to classify or measure the success of their efforts. She summarized that for some women, once the order was in place the violence stopped. For others their requests for external intervention helped them to negotiate components of the termination of the relationship, such as child access and support. Still others found that their decision to involve the state had mixed benefits and costs. At the other extreme, some complainants' efforts to involve the state only worsened their abusive situations. Overall she found that the majority of women interviewed felt that their efforts had assisted them in some fashion. On the issue of diversity among the women she interviewed she noted:

In the context of what has often been a lengthy relationship within which the violent exercise of power and control is an established pattern of behaviour, it is hardly surprising if the resort to law does not produce a simple and unambiguous response. We need to listen closely to women's experiences before imposing outcome measures which deny that experience, and we need to recognise [sic] the limitations of simple quantitative measures, what ever their appeal in terms of simplifying the outcome measures used in the analysis.⁵¹

Therefore, when contemplating community-based responses it must be recalled that assaultive behaviour within a domestic relationship is commonly a very highly charged emotional matter with a complicated background. For instance, researchers suspect culture may play a significant role in promoting violent behaviour within a domestic

⁵¹J. Stubbs, "'Communitarian' Conferencing and Violence Against Women: A Cautionary Note" in M. Valverde *et al.*, eds., *Wife Assault and the Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995) at 265.

relationship.⁵² The restorative justice model assumes that the behaviour is universally detested. This may not be an accurate assumption. If culture is playing a role, the effectiveness of using an accused's family and friends to provide support and to act as a deterrence one wonders what will be reinforced beyond the actual supervised group counselling sessions. Or even if it can be assumed that the support group selected acknowledges the use of violence as abhorrent behaviour, what guarantees exist that this support network will be able to positively impact the relationship and its parties on an extended basis? This may be particularly difficult if part of the behaviour pattern of an abusive male is to isolate the relationship from outside influences.

J. Stubbs also pondered the effectiveness of a community-based shaming strategy on the ability to modify behaviour when it is anchored in a context of power and control implemented by men and which is sustained by a number of different variables. She explains "violence against females partners is widely practiced, is sustained by broader cultural practices, and needs to be understood in broad social and political terms."⁵³ The depth with which the proposed responses of a community-based restorative justice solution, regarding the problems systemic oppression towards women, is still not very well understood.

⁵²See D. Counts, J. Brown and J. Campbell, eds., *Sanction and Sanctuary: Cultural Perspectives on the Beating of Wives* (Boulder Colo.: Westview Press, 1992) as cited by the National Research Council, N. Crowell and A. Burgess, eds., *Understanding Violence Against Women* (Washington: National Academy Press, 1996) at 67.

⁵³J. Stubbs, *supra* note 51 at 278.

Consider for a moment that a woman is trapped within a cycle of domestic violence. How realistic is it that a woman, isolated from her friends and family and subjected to repeated incidents of violent abuse, could gather support from either person's family? Some research indicates that women look to the criminal justice system for help because they were unable to find support and assistance from those in their private lives.⁵⁴ Women also worry that they will not be believed because these family members will not know her partner to be violent.⁵⁵ J. Stubbs found that in her study group women sought court orders, in part, because they felt more able to discuss the matter with someone who was neutral and removed from the immediate relationship.⁵⁶

Lastly, improved access to criminal justice, as opposed to either "transformative" or "restorative" justice, must take into account the strong possibility that, regardless of the specific cause, the abused woman may be caught in a cycle of violence. Those charged with the responsibility of formulating a response to the violence must determine that, due to the controlling influences of her unremorseful abusive partner, she is not merely a pawn being manipulated so that state controlled sanctioning is avoided. J. Stubbs summarizes some of the feminist criticisms of community-based mediations in this way:

⁵⁴*Ibid.* at 280.

⁵⁵*Ibid.* at 280.

⁵⁶*Ibid.* at 280. See also H. Astor, *The Weight of Silence: Talking About Violence in Family Mediation*, in M. Thornton, ed., *Fragile Frontiers: Feminist Debates Around Public and Private* (Oxford: Oxford University Press, 1995) as cited by J. Stubbs, *supra* note 51.

Feminist critiques of mediation have drawn attention to the dangers of assuming that a woman who has been the target of violence is able to assert her own needs, and promote her own interests in the presence of the person who has perpetrated that violence. It is the violent partner who is well practiced in meeting their own interests through violence, control and manipulation. It is also the case that requiring a woman to come together with her violent partner or ex-partner risks providing the occasion for more violence and abuse, especially where the parties are separated.⁵⁷

Therefore, because of the complicated background and many unanswered questions that exist about the numerous causes and consequences of domestic violence, it is suggested that much more research is required to properly assess the role that restorative justice principles might play in reducing this costly and potentially tragic behaviour. It is stressed that two important issues that must be carefully determined before such solutions can be tested, are the safety of the victims and their children, if any, and the affect that a power imbalance premised on physical domination could have on the resolution of the conflicts linked to the violence.

3. Co-ordinate Committee Approach to Creating and Interpreting Studies

Through the examination of the theories of domestic assault, significant gaps in our understanding of the causes, consequences and therefore the most efficient treatments of

⁵⁷*Ibid.* at 281. See also M. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1990-1991) 90 Mich. Law Rev. 1. In this article Mahoney takes the position that assaultive behaviour, within a domestic relationship, is about domination and the male partner's efforts to control his spouse through violence. To advance this position she examines the struggle for control that takes place when a woman separates or attempts to separate from her abusive partner.

the problem have been revealed. At a minimum, it is suggested that the “one size fits all” approach to reform is an insufficient response to bring about meaningful access to justice and protection for women involved in abusive domestic relationships. This issue was contemplated by D. Saunders when he wrote:

These cases illustrate the great diversity among husbands who assault: diversity in violence severity, alcohol use, social class, childhood experiences, and other factors. Some men are aggressive only at home, whereas others are aggressive in many settings and have a long criminal record. The violence may range from a few slaps and shoves to life threatening beatings and use of weapons. The backgrounds and hence the psychological traits of these men are also diverse. Although the patriarchal norms and structure of our society lay a strong foundation for men’s violence against intimate partners, the expressions of their aggressive domination takes many complex forms.⁵⁸

It is suggested here that there must be a concerted effort, by trained professionals, to assess the specific needs of the complainant in addition to the treatment needs of the accused. Also, special care would be required for those determining the appropriateness of this form of counselling for couples expressing a desire to continue in a relationship, particularly if children are involved. This is so for at least three reasons. First, there is a recognized reality that this form of violence usually escalates in its severity.⁵⁹ Second, it has been shown that children of abusive homes are at greater risk of physical harm than

⁵⁸D. Saunders, “Husbands Who Assault: Multiple Profiles Requiring Multiple Responses” in N. Hilton, ed., *Legal Responses to Wife Assault: Current Trends and Evaluation* (Newbury Park: Sage Publications, 1993) at 10.

⁵⁹H. Johnson, “Seriousness, Type and Frequency of Violence Against Wives” in M. Valverde *et al.* eds., *Wife Assault and the Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995) at 136.

other children.⁶⁰ And third, evidence has been gathered that suggests this form of violent behavior may be learned through exposure to it.⁶¹

Once the immediate safety needs of the complainant and her children are assessed, a suitable program for the accused can be considered. This is not to suggest that every male offender should have access to individually structured counselling. However, a review of the literature into the theories of causes and consequence strongly urges that different factors need to be emphasized during the course of counselling. For example, if a pattern of violence seems to be related to the abuse of alcohol then a component of the treatment for the offender should include a focus on the recognition of the connection and the nature of long term commitments to the treatment of alcoholism.⁶² If on the other hand, a

⁶⁰M. Straus and R. Gelles, "How Violent Are American Families? Estimates from the National Family Violence Resurvey and Other Studies" in M. Straus and R. Gelles, eds., *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (New Brunswick, N.J.: Transaction Publishers, 1990) at 95 to 112, as cited by the National Research Council, *supra* note 31.

⁶¹K. O'Leary, "Physical Aggression Between Spouses: A Social Learning Theory Perspective" in V. Van Hasselt *et al.*, eds., *Handbook of Family Violence* (New York: Plenum, 1988), describes social learning theory as a cognitive theory placed in a social context.

⁶²Male drinking patterns, particularly binge drinking, have been associated to domestic violence across all ethnic groups and social classes. See G. Kantor, "Redefining the Brushstrokes in Portraits on Alcohol and Wife Assaults" in *Alcohol and Interpersonal Violence: Fostering Multidisciplinary Perspectives* NIAAA Monograph 24, NIH Publication No. 93-3496 (Rockville Md.: National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, U.S. Department of Health and Human Services, 1993) as cited by The National Research Council, in N. Crowell and A. Burgess, eds., *Understanding Violence Against Women* (Washington D.C.: National Academy Press, 1996) at 55.

cultural myth about violence and gender roles is at the epicentre of the violence, then those constructs must be identified and responded to through education.⁶³

As well, if children are involved it is suggested that counselling may also be required for those indirectly subjected to domestic violence. This is not to suggest that any degree of fault should be leveled at these young victims of circumstance, rather this is a pragmatic reform suggestion directed at the undoing of any misguided learned behaviour. These young persons should be educated about why such behaviour is harmful and wrong and perhaps how communication skills can be developed between partners to avoid the control and oppression of one life partner by another through the use of violence. Moreover, given the dramatic estimates as to the degree of under reporting in the incidents of violence, as were set out in Chapter One, we can assume that the number of cases currently before the criminal justice system represents only the very tip of the iceberg. If we as a society are truly committed to the reduction or perhaps even the elimination of physical domestic abuse, then the education of young people as to these issues should not be exclusively reserved for the children of violent offenders brought to the attention of the state. Schools should be required to include as part of their curriculums, education about these matters. Boys and girls should be taught about the signs of violence, the harms that flow from such debilitating behaviour and the socially acceptable ways in which aggressive feeling must be dealt with. If children are institutionally instructed on issues of street proofing, health care

⁶³D. Adams, "Treatment Models Of Men Who Batter: A Profeminist Analysis" in K. Yllo and M. Bograd, eds., *Feminist Perspectives on Wife Abuse* (Newbury Park, Cal.: Sage Publications, 1988), as cited by the National Research Council, *supra* note 31.

and the responsibilities of sexual intimacy, as if their lives may depended on it, why not educate about domestic violence where we know for certain someone's life is dependent on it?⁶⁴

Having considered these treatment issues, the notion of counselling complainants must be addressed. Certainly the most controversial counselling issue is the concept of "couples therapy" for individuals involved in an abusive relationship. Some experts believe that by initiating such a process, a woman's safety may be jeopardized.⁶⁵ Others suggest that a couples dynamic perspective may create, at least by inference, joint responsibility for the violent behaviour and therefore present the offender with an opportunity to deny responsibility for his acts of violence.⁶⁶ There are very few studies on the effectiveness of such treatment approaches, although one was conducted by K. O'Leary. It compared single-sex group therapies with couples counselling and found significant decreases in the number of violent incidents following both types of treatment, one year after the individuals had completed the treatments. Still, it is important to note that the individuals

⁶⁴The National Research Council, *supra* note 31 at 101. See statistics on intra familial homicide rates discussed in Chapter One.

⁶⁵R.E. Dobash and R. Dobash, *Women, Violence and Social Change* (New York: Routledge, 1992), as cited by the National Research Council, *supra* note 31 at 133. At page 244 of the text they note that "a fundamental principle is to make men responsible for their violence. Consequently, couple or family counselling is rejected as ineffective, even dangerous."

⁶⁶M. Bograd, "Family Systems Approaches to Wife Battering: A Feminist Critique" (1984) 54 *American Journal of Orthopsychiatry* 558, as cited by the National Research Council, *supra* note 31 at 133.

in both counselling groups were directed there from non-severe violent situations and that all of the participants in both paradigms wished to remain together.⁶⁷ Given the potential for further abuse, it is suggested here that before any form of couples counselling is introduced into the criminal justice system far more long term comparative studies are required. In support of this position it has been reported that most experts in the field agree that couple counselling is inappropriate for court mandated counselling sessions and cases that involve more violent offenders.⁶⁸

4. A National Research Centre

This work has attempted to reveal the dramatic complexities associated with the phenomena of domestic violence. Numerous studies have been completed by American

⁶⁷K. O'Leary *et al.*, "An Empirical Comparison of Physical Aggression Couples Treatment vs. Gender-specific Treatment, [unreported] paper presented at the 4th International Family Violence Research Conference, Durham, New Hampshire, July 21 - 24, 1995, Department of Psychology, State University of New York at Stony Brook; as cited by the National Research Council, *supra* note 31 at 134.

⁶⁸E. Gondolf, "Batterer Intervention: What We Need to Know" [unreported] paper prepared for the Violence Against Women Strategic Planning Meeting, National Institute of Justice, Washington D.C., March 31, 1995. Mid-Atlantic Addiction Training Institute, Indiana University of Pennsylvania; as cited by The National Research Council, *supra* note 31 at 134. See also E. Gondolf and E. Fisher, *Battered Women as Survivors* (Massachusetts: Lexington Books, 1988) at 73: "severe police action is likely to be the most effective with the sporadic and chronic batterers who have little previous contact with the police." See also M. Whalen, *Counseling to End Violence Against Women: A Subversive Model* (Thousand Oaks, Cal.: Sage Publications, 1996) at 64, where she rejects couples counselling because physically abused women can never be free from their partner's intimidation. As a result female victims cannot participate freely, equally and without fear of reprisal.

and Canadian researchers to identify and/or eliminate both causes and consequences of this behaviour. Similarly, as new solutions and treatment initiatives are proposed, their effectiveness at reducing the violence is being tested. What is required to co-ordinate and disseminate this new information is a national research centre. To avoid the necessity of recreating the wheel at each new turn, researchers should be made aware of past and current work being done in the field. This could be done through a central agency delegated to keep abreast of the studies and to co-ordinate new research. Such a centre could also monitor the types of work being done so that more longitudinal studies can be completed. In short, the center could promote the collaboration between researchers and practitioners so that study results could be integrated into new criminal justice initiatives.⁶⁹ This is an important piece of the puzzle that is currently missing in our society's commitment to increase our understanding of the problem.

Another difficulty in the field is a lack of terminological consistency. H. Johnson and V. Sacco, in their analysis of Statistics Canada's national survey on violence against women, note that:

Definitions of violence against women in the research literature vary widely. Some include psychological and emotional abuse, financial abuse, and sexual coercion, as well as physical and sexual assault as legally defined.⁷⁰

⁶⁹National Research Council, N. Crowell and A. Burgess, eds., *Understanding Violence Against Women* (Washington, D.C.: National Academy Press, 1996) at 153. They suggest the development of three or four American regional centers to improve research capacity and strengthening researchers and service providers collaboration.

⁷⁰H. Johnson and V. Sacco, "Researching Violence Against Women: Statistics Canada's National Survey" (1995) 37 *Canadian Journal of Criminology* 281 at 289.

In addition to the types of behaviour researched, others have studied incidents of assaultive behaviour between intimates along side other forms of abuse that may also occur in familial settings, such as child and elder abuse. A national research center could be of some assistance to those gathering data in the field in the recognition of these variables and perhaps support the use of a common measure of violence. For example, M. Straus developed a scale of nine escalating physical violence items called the Conflict Tactic Scale.⁷¹ The use of such a standardized model could allow for more concise comparisons between findings and measuring the impact of different criminal justice response.

Similarly, there must be some general guides regarding the measurement of success for different initiatives. Currently, how success is measured varies widely. Is recidivism the key, or should the yardstick measure overall incidents reported to the police? Are conviction rates an indication of success? If culture does play a role should these statistics be monitored so that resources and efforts can be channeled where they may be needed most? Or perhaps a primary goal should be the completion of a treatment program. If so, then efforts to modify programs to specific needs must be measured in some consistent fashion. Again, it is suggested here that the use of a national research centre could assist in setting national standards for the measurement and assessment of the impact that different

⁷¹M. Straus, "Measuring Family Violence. The Conflict Tactic Scale" (1979) 41 *Journal of Marriage and the Family* 75, as cited by the National Research Council, *supra* note 31. See also W. DeKeseredy and B. MacLean, "Researching Women Abuse in Canada: A Realist Critique of The Conflict Scale" (1990) 25 *Canadian Review of Social Policy* 19.

initiatives have on a comparative basis.

To advance the position that there is a significant need for a national research centre, three different societal responses to domestic violence are considered. In Manitoba, the Winnipeg Family Violence Court (FVC) began its operations on September 17, 1990.⁷² The goal of the program was to provide a better environment in which to process “family violence” cases.⁷³ The desired effects were to include a more expeditious processing of cases through the use of specially trained court judges and prosecutors. Their training incorporated their experiences to help increase their contextual understanding of family violence cases. After the first year, results were analyzed and it was found that, “the performance of the FVC in the first year was outstanding in its achievement of expeditious processing, high conviction rates and consistent and appropriate sentencing.”⁷⁴

In the province of Saskatchewan, the *Victims of Domestic Violence Act*⁷⁵ was proclaimed

⁷²E. Ursel, *Winnipeg Family Violence Court Evaluation*, Research, Statistics and Evaluation Directorate, WD1995-2e (Ottawa: Department of Justice Canada, 1995) at ix.

⁷³*Ibid.* The family violence cases evaluated included spousal assaults, child abuse and elder abuse cases.

⁷⁴*Ibid.* at ix. This report focused on the second year of the FVC’s operation. First, it examined to what extent the FVC could maintain its momentum in light of the increase in the number of cases that it dealt with. Second, it studied the relationship between the FVC and the other nonspecialized criminal courts in the province in an attempt to comparatively measure its success and efficiency.

⁷⁵ S.S. 1994, v-6 .02 [hereinafter *VDVA*].

on February 1, 1995. In an effort to improve on the unresponsiveness of the criminal justice system to the needs of abused women, additional options were legislatively created. These options included “assisting women promptly after an offence is reported; providing immediate assistance on property matters; removing an abuser from the family home; and seeking alternatives for victims who do not report abuse to any agency.”⁷⁶ The legislation created three basic types of remedies that were designed to enhance the provisions of the Criminal Code and related provincial statutes, to help the victims of domestic violence. These remedies involved emergency intervention orders, victim assistance orders and warrants of entry.⁷⁷ An undertaking was initiated to assess the implementation phase of this new response, regarding its impact on assisting the victims of domestic violence and the degree to which the objectives of the Act have been met. Data was collected through file reviews, the analysis of administrative data and personal interviews of both victims and a number of key individuals involved in the criminal justice system, including justices of the peace, judges, lawyers, police and victim services personnel. Through this process it was determined that more education and training was required for the persons responsible for the implementation of the legislation.⁷⁸ Also, it was revealed that a consistent method of identifying the orders used across police services and courts was needed, in addition to the production of monthly police statistical reports.

⁷⁶Prairie Research Associates Inc., *Review of the Saskatchewan Victims of Domestic Violence Act*, WD1996-6e (Ottawa: Department of Justice Canada, 1996) at 1.

⁷⁷*Ibid.* at 1. See also the *VDVA*, *supra* note 75, sections 3, 7 and 11.

⁷⁸*Ibid.* at 39 to 42.

The mandatory charging policy in the Yukon was also recently reviewed. This policy evolved from a public statement issued by the Minister of Justice and the Solicitor General in December of 1983. The purpose of the statement was to initiate a directive that would remove from the victims of domestic assault the responsibility for initiating criminal charges and to ensure that both the police and the prosecutors would prioritize domestic assault cases. Over a 12 month period, ending in December 1995, a study was conducted to examine the “effectiveness and impact of criminal justice interventions in spousal assault cases, and the potential limitation of mandatory charge / pro-arrest policies” of a directive initiated 11 years earlier.⁷⁹ The study involved a number of interviews with criminal justice, social service and First Nations respondents, victims of domestic assaults and domestic assault offenders. A primary concern for the organizers of the study was that it should reflect a strong community base. As a result, T. Roberts, the author of the report, explained that the format of the study was:

not based on a quantitative analysis of all spousal assault cases over an extended period of time, nor a tracking methodology, but rather on the subjective and experience based responses of groups and individuals that have been involved with the issues of spousal assaults in the Yukon.⁸⁰

With regards to the criminalization of domestic violence, all respondents supported the concept of mandatory charging, based on the notions that there should be a clear message sent to society that such behaviour is unacceptable and that victims of family violence need

⁷⁹T. Roberts, *Spousal Assault and Mandatory Charging in the Yukon: Experiences, Perspectives and Alternatives*, WD1996-3e, Research, Statistics and Evaluation Directorate (Ottawa: Department of Justice Canada, 1996) at xiii.

⁸⁰*Ibid.* at xiv.

protection from their abusive partners. Yet, there was “considerable division” in those polled over whether mandatory charges should necessarily lead to the mandatory prosecution of those charges.⁸¹ Victims in particular, wanted the criminal justice system to “validate their perceptions, reduce their isolation, and hear their needs.”⁸² It was the perception of many of those that responded that these goals could be accomplished without a criminal trial and state sanctioning. Also, the study found that the mandatory charging policy did very little to encourage the reporting of incidents. T. Roberts wrote:

Roughly 70 percent of community respondents feel the policy has been consistently applied, although there is certainly evidence that discretion and inconsistency still exist. Nonetheless, there is a strong consensus that the actual incidence of spousal assault remains considerably higher than the incidence of report, and two-thirds of victims did not report earlier assaults.⁸³

In the end, the report concludes that the effect of mandatory charging may in fact be counter productive to the primary aims of the 11 year old directive, specifically the removal of the responsibility from the victims of domestic violence for the initiation of criminal charges.

Therefore, it is argued here that while all three of these studies are important, each of them

⁸¹*Ibid.* at 111. The conclusions of this study were based on the feedback from victims, offenders, and community respondents interviewed from the time of an alleged incident through the reporting, processing, enforcement up until the final outcome stages of state response.

⁸²*Ibid.* at 111.

⁸³*Ibid.* at 112. Note that the study also addresses cultural issues (the differences between First Nations and non-First Nations Respondents) and the disparity of resources between the larger and smaller communities.

is very different from the others. Their methodologies, that set out to increase society's understanding of the domestic assault problem and to hopefully improve the manner in which the criminal justice system responds to this type of criminal offence, are as varied as the initiatives they examined. To increase the studies value to the eradication of the societal problem on a broader national level, a central specialized and highly skilled resource centre could be used to both dissect and superimpose individual findings of these types of studies on some of the common themes discussed in chapter three, such as the causes and consequences of domestic violence. This would make a more efficient use of the time and monies spent on researching domestic violence by individual communities by avoiding duplication, building on the consistent findings and promoting further and longer term studies on the inconsistent or contrary findings.⁸⁴

(D) Conclusions

Two inequalities of the criminal justice system have been presented in this thesis. First, the courts have failed female complainants of sexual assault by balancing their Charter

⁸⁴An article written by L. MacLeod reviews some of the issues examined at a one-day workshop on wife assault and the criminal justice system. It was held in Toronto on November 25, 1994. Her article summarizes some of the findings from a number of recent criminal justice responses, including the Winnipeg Family Violence Court and the Saskatchewan Victims of Violence Act. See L. MacLeod, "Expanding the Dialogue: Report of a Workshop to Explore the Criminal Justice System Response to Violence Against Women" in M. Valverde, L. MacLeod and K. Johnson eds., *Wife Assault and the Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995) 13 at 20 to 24.

guaranteed right to equality before the law and their right to privacy below the right's of an accused to full answer and defence. The reforms suggested here would have the effect of rebalancing these competing interests by the reliance upon the doctrine of judicial notice of the legislative fact of significant harm that flows from the opening of a complainant's counselling records. Such a legal principle would not absolutely exclude the availability of a complainant's counselling or therapeutic records in all circumstances. This reform would work to avoid the harm that would flow, to the accused, from a miscarriage of justice created by the possibility of relevant evidence being absolutely banned from access. Yet it would, in effect, firmly place on an accused person the responsibility of presenting evidence to establish that the record is likely relevant to an issue at trial and that the production of the record is necessary in the interest of justice before such records are opened and a women's right to privacy are trampled needlessly. The hope is that such reform would also open access to justice for women who have been sexually assaulted by guaranteeing that their most private mental health files and records are not opened by an accused on a violative fishing expedition.

Second, it has been argued that physically abused women have been denied real access to a criminal justice by a system that has failed to appreciate the numerous causes and consequences to domestic assault. In the reforms suggested for domestic assault, it has been stressed that the key to making significant progress is a collaborative effort from all interested parties. The eradication of the problem will not come from one single reform but rather from a series of initiatives that assess the real needs of abused women and the

complex causes and consequences of the violent behaviour of their male partners. It has been stressed that this type of assessment requires a contextualization of the violence within the individual relationship as well as the accompanying broader societal issues. The restorative justice principles may very well play a role in the solution to this social dilemma, but more research is needed before an abused woman's safety is placed at risk. The significance of this risk presented itself twice during the preparation of this chapter. On June 11, 1999, Ms. Samson was shot to death at a shelter for abused women in Quebec. Her estranged partner, Marcel Samson, set fire to the couple's home that they shared for 20 years, then forced his way into the shelter, found Ms. Samson and shot her seven times with a hunting rifle, as ten other women and children "cowered nearby." I. Peritz, a writer for the *Globe and Mail*, reported that, "only hours before her death, she told staffers that she would not return home because she feared for her life."⁸⁵ On June 25, 1999, Rhonda Nickerson was shot and killed, by her estranged husband, in her parents home on Cape Sable Island, Nova Scotia. Barry Nickerson had been released from custody, pending the resolution of a number of domestic assault and uttering death threat charges, laid in April of 1999 and alleged to have taken place back as far as 1983. At the time he shot and killed his wife, he was enrolled in a male batterers counselling program. After killing Ms. Nickerson, he turned the gun on himself and took his own life.⁸⁶ These

⁸⁵I. Peritz, *The Globe and Mail*, "Quebec Woman Shot to Death at Shelter for Battered Women," 11 June 1999, A2.

⁸⁶B. Medel, *The Mail-Star*, "Murder-Suicide gun already in house," 28 June 1999, A1. The article indicates that Mr. Nickerson was attending the "Men at Peace" volunteer-run program, in Yarmouth Nova, Scotia.

horrific stories not only depict the gravity of the potential consequences of domestic assault, but also emphasize the immediate need for workable solutions to this shocking, shameful and sometimes deadly behaviour. To expedite these reforms, it has also been urged that a national research centre should be created so that solutions can be identified and efficiently implemented. As we have seen, human lives depend on effective initiatives and answers.

CHAPTER FIVE: CONCLUSIONS

The concept of “equal” treatment that has been presented in this thesis has been adopted from the Canadian jurisprudence. This theory of equality rejects the notion of the same treatment for all means equal treatment for everyone. It champions the realizations of McIntyre J. that “identical treatment may frequently produce serious inequality”¹ and that the essence of true equality is the accommodations of differences.² The key to determining what these differences are requires an analysis that is purposive and contextual.³ The answer to assessing context is the identification of the interrelationships between social variables and how these variables are linked to one another within the realm of law.

The disclosure of a sexual assault complainant’s therapeutic or counselling records and two recent criminal justice responses to the crime of domestic violence demonstrate the complexities associated with the gender inequalities that exist in the Canadian criminal justice system. The unequal treatment of these female complainants and witnesses has been anchored in the criminal justice system’s failure to appreciate the issues connected to these dilemmas within their proper context. In other words, the criminal justice system has failed to properly contextualize these gender specific issues.

¹*Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.) at 10.

²*Ibid.* at 13.

³*Law v. Minister of Human Resources Development*, File No.: 25374, judgement March 25, 1999 (S.C.C.).

A number of choices were made in this thesis about the terms used to discuss these topics. It was admitted that the terms eventually selected were far from ideal and were influenced by the author's own gender and experiences, including those as a legal practitioner and prosecutor. The terms used to discuss these issues and, most importantly, the process of contextualizing them is a critical component of the exercise. Since these issues directly impact women and because these women often feel marginalized and ignored by the criminal process, it is concluded that they should be given a voice in the debates regarding these serious problems, their potential tragic consequences and their solutions.

The complexities of women's lives, specifically as complainants whose lives have been affected by criminal violence, was highlighted throughout this work. The inequality of women's treatment within the criminal justice system was presented through the conflicts that arise between their interests, needs and rights and the rights of an accused person to full answer and defence. To help understand these conflicts and the potential for reforms to these problems, the procedural nature of a criminal trial was outlined. The concepts of the litigation parties and due process were also explored.

The scope of the problem was discussed from the perspectives of frequency and the significant strife of female victims' under-reporting incidents of violence. It has been estimated that approximately one third (29%) of Canadian women who have ever been married or lived in a common law relationship have been physically or sexually assaulted

by their partner at some point during the term of that relationship.⁴ According to the *Homicide Survey*, in 1991, 270 women in Canada were murdered.⁵ Investigative agencies reported that of this number, 225 were classified as solved. From this category it was determined that 210 of these murdered women were killed by men and 121 of these victims were killed by their intimate partners. During the time it took this author to edit and revise one chapter of this thesis, two more female victims were killed by their spouses after they tried to unsuccessfully end the violence in their homes that controlled their lives.⁶ For these women the term “survivor” rings hollow. We as a society can no longer debate policy. The number of lives that are affected by this type of dangerous and potentially fatal conduct heightens the desperate need for changes. The under-reporting exasperates this issue and presents a platform for denied access to justice is yet another consequence of this form of gender inequality. The law must react quickly before more lives are lost and destroyed. It is urged that the key to meaningful improvements is contextualism as the standard of judicial analysis and protection through the equality rights

⁴Family Violence Initiative Program and Health Canada and Statistics Canada, as cited in the *Final Report, From Rhetoric to Reality Ending Domestic Violence in Nova Scotia*, Law Reform Commission of Nova Scotia, February 1995. See also K. Rodgers, “Wife Assault: The Findings of the National Survey” *Juristat*, March 1994, Vol. 14, No. 9, Cat. 85-002.

⁵Canadian Centre for Justice Statistics, *The Homicide Survey, 1991* (Ottawa: Statistics Canada, 1993).

⁶I. Peritz, *The Globe and Mail*, “Quebec Women Shot to Death at Shelter for Battered Women,” 11 June 1999, A2; B. Medel, *The Mail Star*, “Murder-Suicide gun already in house,” 28 June 1999, A1.

guaranteed under section 15 of the *Charter*.⁷

The law's current response to the issue of the disclosure of a sexual assault complainant's therapeutic or counselling records was presented in a chronological manner. The courts' response to the procedural and evidential issues was analyzed through a detailed review of the *O'Connor* case⁸ and the legislation, Bill C-46,⁹ that followed that decision. The cases, particularly *R. v. Mills*,¹⁰ that tested the constitutionality of the Bill C-46 were also reviewed. The central theme in this component of this thesis was the courts' balancing of the competing interests of the male accused and the female complainant. More specifically, the recognition and treatment of the accused's *Charter* guaranteed right to full answer and defence was compared to the complainant's right to privacy and equality before the law. It is concluded that the effect of the courts' efforts to balance these competing interests resulted in a hierarchy of rights, with those of women complainants balanced below the rights' of the male accused. Based on this, it is suggested that the reasons relied on by the courts to assess these conflicting interests often neglect the true context of these records. The courts have failed to recognize and weigh the impact that the opening and disclosing these records, particularly to an accused person, had on a complainant. As well, the courts

⁷Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), c.11 [hereinafter "*Charter*"].

⁸*R. v. O'Connor* (1994), 89 C.C.C. (3d) 109 (B.C.C.A.); (1996), 103 C.C.C. (3d) 1 (S.C.C.); *R. v. O'Connor (No. 2)* (1994), 90 C.C.C. (3d) 257 (B.C.C.A.).

⁹*Criminal Code* R.S., c. C-46 [hereinafter *Criminal Code*].

¹⁰(1997), 205 A.R. 321; 207 A.R. 161 (Q.B.), on appeal to the Supreme Court of Canada.

have failed to assess the consequences associated with such a breach of these extremely private materials might have on other victims' willingness to access justice in the criminal courts. One additional issue presented in this work was the level of recognition by the courts of the complainant's rights. The evolution of these rights to *Charter* status, particularly an equality right, was achieved through an examination of the Supreme Court's assessment of similar issues within the civil law context. As well, the Supreme Court's deliberation of a class privilege for these types of records was looked at in the case of *L.L.A. v. Beharriell*.¹¹ This assisted in the presentation of an argument that supported that need for the courts to acknowledge victims' rights as equally guaranteed by the *Charter* as those of the accused.

In an effort to analyze some of its shortcomings, the criminal justice system's failure to contextualize women's lives after having been exposed to male violent behaviour was revealed. At the core of these problems is an unsuccessful appreciation of the context of the issues, including the causes and consequences of this deplorable criminal behaviour. To begin to unravel these issues the theories of domestic assault were summarized. Two recent criminal justice responses to domestic violence were analyzed. The first initiative was the "K Court" model commenced in Toronto. This program has been created, in part, to improve the effectiveness of the criminal courts fact finding mission of a trial. It is premised on a multi-professional commitment to the reformed treatment of domestic assault charges. Police as investigators, Crown Attorney's as prosecutors and judges as

¹¹(1995), 103 C.C.C. (3d) 92 (S.C.C.).

triers of both facts and law were trained to ensure an appreciation of the complexities connected with an assaultive domestic relationship, including the phenomenon of a recanting complainant. This is acknowledged as a positive step towards a contextual appreciation of the issues linked to domestic violence, but it is stressed that it has failed to go far enough to truly impact the varied causes and consequences of domestic violence.

This response was compared to the plea and conditional discharge court model, implemented in a number of different jurisdictions throughout Ontario. This initiative includes the court ordered treatment of accused persons through court mandated counselling sessions for their abusiveness. Once completed the criminal justice system then rewards the accused's acknowledgement of guilt and commitment to change with a conditional discharge and perhaps some additional form of deterrence.

Related to the prosecution of domestic assault charges, a number of the cases that addressed the treatment of a recanting complainant's evidence were examined. This required an examination of the Supreme Court's creation and adaptation of a principled approach to the admission of hearsay evidence for the truth of its content. The leading cases of *R. v. Khan*,¹² *R. v. B.(K.G.)*,¹³ *R. v. Smith*,¹⁴ and *R. v. U.(F.J.)*¹⁵ were briefed and

¹²[1990] 2 S.C.R. 531; 59 C.C.C. 92 (S.C.C.).

¹³(1993), 79 C.C.C. (3d) 97 (S.C.C.).

¹⁴[1992] 2 S.C.R. 915; 75 C.C.C. (3d) 257 (S.C.C.).

¹⁵(1995), 101 C.C.C. (3d) 97 (S.C.C.).

their principles were applied to the issues often connected to the prosecution of domestic assault charges. One case directly on point that was also scrutinized was *R. v. Mohamed*.¹⁶ Other recent cases that addressed the issue of the admission of hearsay evidence in a criminal trial were also presented. Of significance in these cases was the courts' consideration of a statement's reliability and external guarantees of trustworthiness. It is reasoned that a truly principled approach to hearsay reform, combined with certain fundamental evidence concepts and the context of domestic violence itself, require the courts to consider all possible factors that support or detract from the reliability of a recanting witness's original statement of complaint.

Moreover, in the analysis of these recent hearsay cases one other gender issue is revealed. Specifically regarding equality, it would appear that a residual discretion exists with trial judges to allow the necessity for full answer and defence to trump the requirement for reliability. It is emphasized that this right is the identical premise that is relied upon to allow the rights of a male accused to be "balanced" above the rights of a female sexual assault complainant to privacy and equality before the law.

To reform these failures it is urged that meaningful changes require a contextual appreciation of the problems. To improve the equality rights of female complainants, modifications to the criminal justice system are required. These modifications must accommodate the gender differences linked with surviving violent crime. The failure to do

¹⁶[1997] O.J. No. 1287 (Ont. Prov Div.).

so violates women's essential human dignity and freedom, guaranteed to all citizens under the *Charter*.

With regards to the disclosure of a sexual assault complainant's therapeutic or counselling records a reconstructed approach to balancing the competing interests of a male accused and a female complainant is suggested. Judicial notice of the significant harm that flows from to a sexual assault complainant from either the delaying of treatment or the interruption of her counselling process is an alternative available to the courts to avoid the revictimization of a woman's integrity and human dignity. Support for this reform can be found in the wording and intent of Bill C-46. This legislation establishes both an onus on the accused seeking the disclosure of these highly sensitive and personal records, as well as a number of factors that cannot be regarded as sufficient for making the case for disclosure. The codification also provides a list of permissible considerations that a judge must contemplate when requested to determine the appropriateness of a disclosure request. These provisions assist judges in resolving the conflict between the competing interests and the judicial notice of the harm linked to this process. The doctrine of judicial notice allows the courts to consider societal impact issues, including the chilling effect that this type of privacy invasion may have on women's access to justice in the criminal courts, within the classification of legislative fact. Support for this position is also bolstered by academics' writing on the subject, some analogous case law dealing with the issue of the harm that flows from racism and /or a principled argument premised in context.

Related to the dilemma of domestic violence the reforms tabled in this work focussed on the diversity of causes and consequences linked to the criminal behaviour. To start, it is proposed that both of the recent Ontario initiatives, a rigorous prosecution model and a court mandated treatment based deterrence approach, must exist together. A conviction for a physically abusive male at the end of the day without counselling returns a troubled and physically dominating male back into a repeating cycle of violence. This results in great risk to his female partner and perhaps their children. Similarly, a lenient treatment course, without the threat of other traditional criminal punishments, including incarceration, fails to provide for the possibility of a less than committed male who drops out of his counselling session. This male could then end up back in a home where he feels invincible and continues to control his female partner with immunity. Given the escalating nature of this form of violence both scenarios present unacceptable risks to an innocent party.

Regarding the contextualization of these initiatives it is concluded that because domestic violence may have a number of different causes and consequences, then a one size fits all treatment is less than an effective solution. It is emphasized that regardless of how a batterer finds his way into a treatment program some expert form of assessment is needed to properly channel his specific problems into a particular type of counselling. Also, other options such as the community based restorative justice philosophy need to be explored. The strengths and weaknesses of these alternatives must be assessed with special attention paid to the context of the cyclical nature of domestic violence. More research is needed

before women who have been manipulated by their male partners through the use of physical violence are placed at the centre of any process established to terminate the abuse. To avoid the same pitfalls associated with the conventional criminal justice system's treatment of domestic violence women's equality rights must remain the focus of this reform. Policy advisors and politicians entrusted to protect the vulnerable in society must not be distracted by issues of expense and efficiency if this problem is to be successfully battled.

This imperative for additional research leads to the conclusion that what is needed is a co-ordinated committee approach to creating and interpreting existing and future studies.

This could best be achieved through a national research centre, established to pool information and make the most efficient use of the information that is available, planning future studies and avoiding costly duplications. Three different programs initiated in three different parts of the country were examined to help make this point. It is stressed that domestic violence is a critical problem with many complicated layers. It is time that we as a society commit to ending the needless waste of precious opportunity and lives. More than women's equality, essential humanity dignity and freedom is at risk.

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